TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~. 1905.

No. ~~355~~ 54.

JOHN D. JACK, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JUNE 27, 1904.

(19,405.)

(19,405.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 305.

JOHN D. JACK, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 2d day of October, A. D. 1903, there was filed in the office of the clerk of the supreme court of the State of Kansas, an assignment of errors, notices of appeal and transcript of record from the district court of Shawnee county, which assignment of errors, notices of appeal and transcript of record are in words and figures as follows, to-wit:—

2 In the Supreme Court of the State of Kansas.

STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant. } No. 13774.

Assignment of Errors and Transcript of the Record.

Filed Oct. 2, 1903.

D. A. VALENTINE,
Clerk Supreme Court.

3 In the Supreme Court of the State of Kansas.

STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant. } No. 13774.

Assignment of Errors.

Filed Oct. 2, 1903. D. A. Valentine, Clerk Supreme Court.

Now comes the appellant, John D. Jack, and complains of the judgment pronounced against him by the district court of Shawnee county, Kansas, on the 8th day of September, 1903, adjudging him guilty of contempt of court and sentencing him to be confined in the county jail of Shawnee county until he should be willing to answer certain questions propounded, but not beyond a period of thirty days.

A full, true and correct transcript of the record in said proceedings, duly certified according to law, is hereto attached, marked "Exhibit A," and made a part hereof.

And this appellant avers that, as shown by said transcript of the record, material and prejudicial errors occurred in said proceedings, affecting the substantial rights of this appellant and the said judg-

ment and sentence are erroneous and contrary to law for the following reasons, to-wit:

First. That the appellant, under and by virtue of section ten of the bill of rights was exempt from answering the questions propounded and from giving testimony with reference to the subject of said inquiry and the order of the district court in overruling his claim of immunity was in violation of said section ten of the bill of rights.

Second. That section 10 of chapter 265 of the Laws of 1897, upon which the proceeding was founded, is in violation of that provision of the fourteenth amendment to the Constitution of the United States which provides that "no State shall deprive any person of life, liberty, or property without due process of law;" said proceeding not being due process of law, in that it was not founded on either complaint, information or indictment. No complaint specifying with reasonable certainty an offense charged to have been committed had been filed, but upon testimony sought to be adduced from appellant, he might have been subjected to penalties
4 and forfeitures provided by other provisions of the act, and also might have been compelled to incriminate himself and give information as to the details of the said alleged combination and agreement and the names of parties and witnesses which might supply the means of convicting appellant of a crime and of subjecting him to imprisonment, fines, forfeitures and penalties; and that said proceeding consequently deprived appellant of his liberty, property, privileges and immunities in a way other than by due process of law of the land.

Third. For the same reasons set forth in the second assignment of error said proceeding and judgment are further in violation of that provision of the fourteenth amendment of the Constitution which provides that "no State shall deny any person within its jurisdiction the equal protection of the laws."

Fourth. That chapter 265 of the Laws of 1897 is violative of that provision of the fourteenth amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge privileges and immunities of citizens of the United States," in that it unreasonably restricts and limits the right and privilege of a citizen engaged in lawful occupation. And is further violative of that provision of the fourteenth amendment which provides that "no State shall deprive any person of life, liberty or property without due process of law," in that it unreasonably limits and restricts the right of private contract and of a citizen to engage in a lawful occupation. And is further violative of that provision of the same amendment which prohibits any State from denying any person within its jurisdiction the equal protection of the laws, in that it unreasonably discriminates between different classes of citizens of the United States and denies certain citizens the equal protection of the laws.

Fifth. That the proceeding provided by section 10 of said chapter

265 is not judicial in its character and the power attempted to be conferred upon the district court or judge in said section 10 is not judicial.

Sixth. That the said act and said section 10 thereof are in violation of section one of the bill of rights.

Seventh. That said act and said section 10 thereof are in violation of section 15 of the bill of rights.

Eighth. That said act is in violation of section 16, article 2 of the State constitution, which requires that no bill shall contain more than one subject which shall be clearly expressed in its title.

Wherefore, and by reason of the foregoing, and for other sufficient and manifest errors appearing in said record, the appellant prays that the judgment of the court below may be reversed, vacated, set aside and held for naught, and that appellant may be restored to all things which he has lost by reason of the rendition thereof, and for all other proper and necessary relief.

ROSSINGTON, SMITH & HISTED,
J. T. PRINGLE,
R. B. GILLULY,
Attorneys for Appellant.

EXHIBIT A.

In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN D. JACK, Defendant. } No. 4275.

Transcript of the Record.

Filed Oct. 2, 1903. D. A. Valentine, Clerk Supreme Court.

Be it remembered that on the 8th day of September, 1903, certain proceedings were had in this case and a record of the same was duly made upon the journal of the court, in words and figures, as follows, to-wit:

Now on this 8th day of September, 1903, it is made to appear to the court that a proceeding or investigation was heretofore instituted in this court by the attorney general of the State of Kansas and the county attorney of Shawnee county, Kansas, to make inquiry concerning the existence of an alleged combination of coal operators in the State of Kansas in violation of the anti-trust law, said proceeding being known as file or case No. 22415 in this court.

And it is further made to appear to the court that pursuant to an order made by the court a subpœna was issued and duly served

upon the defendant above named, commanding him to appear before this court as a witness in said investigation or proceeding No. 22415 and give testimony concerning the matters under investigation therein; that said John D. Jack did appear in open court in obedience to said subpœna, was duly sworn, and was placed upon the witness stand, and that questions were asked him and answers and statements were made by him, and certain findings and orders were made by the court as follows, to-wit:

Questions by Mr. HUNGATE, county attorney:

Q. State your name.
A. John D. Jack.
Q. Where do you live?
A. Burlingame.
Q. What is your business?
A. Coal operator.
Q. Where?
A. Burlingame.
Q. What do you mean by a coal operator?
A. Owning a coal shaft and running coal business.
Q. Mining coal?
A. Yes sir.
Q. How long have you been in that business?
A. About 15 years.
7 Q. Have you operated a mine continuously during the last fifteen years?
A. Pretty much.
Q. Do you know of any meetings of the operators of Osage county being held in this city (Topeka) at intervals during the last year?

A. Your honor, I respectfully decline to answer these questions. I claim my constitutional rights and under them I decline to answer these questions. I decline to answer upon the following grounds:

I am engaged in operating a coal mine in Osage county, Kansas, and in dealing in the output of said mines, and am one of the persons named in the application for subpœnas in this proceeding. The product of the mines of Osage county is the subject of both domestic and interstate commerce.

I respectfully decline to answer the questions, or to testify with reference to the subject of this inquiry, for the reason that in answering the questions and in submitting myself to an examination as a witness, I may incriminate myself and give information as to the details of the said alleged combination and agreement, and the names of parties and witnesses which might supply the means of convicting me of a crime and of subjecting me to imprisonment, fines, forfeitures and penalties, and I therefore claim the privilege and immunity of section 10 of the bill of rights.

Without in any manner waiving my immunity and privilege, I further object to any proceeding upon this application for the following reasons:

First. That chapter 265 of the Laws of 1897 is violative of that provision of the fourteenth amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States," in that it unreasonably restricts and limits the right and privilege of a citizen engaged in a lawful occupation; and it is further violative of that provision of said fourteenth amendment which provides that "no State shall deprive any person of life, liberty or property without due process of law," in that it unreasonably limits and restricts the right of private contract and of a citizen to engage in a lawful occupation; and is further violative of that provision of the same amendment which prohibits any State from denying any person within its jurisdiction the equal protection of the laws, in that it unreasonably discriminates between different classes of citizens of the United States, and denies certain citizens the equal protection of the laws.

8 Second. That section 10 of said chapter 265 of the Laws of 1897, upon which this particular proceeding is founded, is in violation of that provision of the fourteenth amendment to the Constitution of the United States which provides that "no State shall deprive any person of life, liberty or property without due process of law," said proceeding not being due process of law in that it is not founded on either complaint, information or indictment, no complaint specifying with reasonable certainty an offense charged to have been committed has been filed, but upon testimony adduced the witness may be subject to penalties and forfeitures provided by other provisions of the act, and that the said proceeding deprives certain citizens and classes of citizens of the United States, including myself, of their liberty, property, privileges and immunities in a way other than by due course of the law of the land; that the said proceeding is not judicial in its character, and the power attempted to be conferred upon the district judge or court in section 10 is not judicial. For the same reasons, said proceeding is further in violation of that provision of the fourteenth amendment to the Constitution of the United States which provides that no State shall deny any person within its jurisdiction the equal protection of the laws.

Third. That said act and said section 10 thereof are in violation of section 1 of the bill of rights.

Fourth. That said act and said section 10 thereof are in violation of section 15 of the bill of rights.

Fifth. That said act is in violation of section 16 of article 2 of the State constitution, which requires that no bill shall contain more than one subject, which shall be clearly expressed in its title.

The court overruled the objections made by the witness and directed the witness to answer the question.

The WITNESS: I object to answering the question for the reasons stated.

The COURT: Do you refuse to answer the question?

The WITNESS: Yes sir, for those reasons.

Q. I will ask you if you have any knowledge of a combine or an agreement being entered into by operators in coal of Osage
9 county for the purpose of fixing the price of coal sold to residents and citizens of Kansas?

Q. Your honor, I decline, under the same objections, to answer any of these questions.

Q. Have you any knowledge of any meetings of coal operators of Osage county, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?

A. Your honor, I still decline to answer these questions, under the same objections.

Q. Do you know of any agreement having been entered into within this county within the last year between the operators in coal who operate in Osage county, Kansas, by which they attempted to fix and settle the price of coal between themselves and citizens of Kansas?

A. Your honor, I still decline, under the same objections.

The COURT: As I understand, you decline to answer each of these questions?

The WITNESS: Yes sir.

The COURT: The court finds that the excuse given for declining to answer is insufficient.

The court instructed and directed the witness to answer the questions propounded to him, but the witness still refused to answer the questions or any one of them except as above indicated, whereupon the court made the following finding and order, to-wit:

"The court finds you guilty of a direct contempt of court in refusing to answer the questions, and the order of the court is that you be committed to the jail of Shawnee county until you shall answer these questions, but not beyond a period of thirty days."

The witness excepted to the ruling, finding and order of the court.

And the court finds that said defendant, John D. Jack, is guilty of a direct contempt of court in refusing to answer the questions propounded to him by the county attorney in open court, as above set forth.

It is, therefore, considered, ordered and adjudged that said John D. Jack be confined in the county jail of Shawnee county, Kansas, until he shall be willing to answer said questions so propounded to him in open court by the county attorney in said proceeding No. 22,415, but not beyond a period of thirty days.

10 To all of which findings, rulings, orders, judgment and decision of the court the defendant, John D. Jack, excepts.

Thereupon the defendant asked the court to fix the amount of bond which would be required to stay the execution of the judgment and sentence of the court, and the court fixed said bond at the sum of two hundred dollars.

Thereupon said defendant was allowed ten days in which to reduce his exceptions to writing, have the same allowed and filed in the office of the clerk.

Afterwards, and on the 14th day of September, 1903, there was filed in the office of the clerk of the court a bill of exceptions in this case, which is in words and figures as follows, to-wit:

"In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN D. JACK, Defendant. } No. 4275.

Bill of Exceptions.

Comes now the defendant, John D. Jack, and presents to the court the following as a full, true and correct bill of exceptions, setting forth all the proceedings had and exceptions taken and saved by him during the hearing of a certain proceeding or inquiry concerning an alleged combination of coal operators in the State of Kansas in violation of the anti-trust law, the same being designated as case or file No. 22,415, pending in the district court of Shawnee county, Kansas, being the case, investigation or proceeding leading up to and forming the basis of the order which was made by the court in the above entitled cause committing this defendant to the county jail of Shawnee county for a contempt of court; and this defendant asks the court to sign, settle, allow and certify the same as a full, true and correct bill of exceptions.

ROSSINGTON, SMITH & HISTED,
Attorneys for Defendant.

11 Be it remembered that on the 3rd day of September, 1903, there was filed in the office of the clerk of the district court of Shawnee county, Kansas an application for the issuance of certain subpœnas, which is in words and figures as follows, to-wit:

In the District Court of Shawnee County, Kansas.

In re Application for Subpœnas for THOMAS CHAPPEL ET AL.

Application.

The Hon. Z. T. Hazen, judge of the district court:

Comes now C. C. Coleman, attorney general of the State of Kansas, and Otis E. Hungate, county attorney of Shawnee county, Kansas, and give the court to be informed that a combination of the persons engaged in operating coal mines in Osage county, Kansas, and in

dealing in the output of said mines in Osage county, Shawnee county, and other counties throughout the State, exists, the object of which is to fix the price of coal at the mines, and which does in fact fix the price of coal which shall be charged to purchasers at their said mines; that the said combination of persons has its regular meeting place in the city of Topeka, Shawnee county, Kansas, and that said combination meets and has met for a year next preceding the filing of this application on the last Saturday night of each month; that at said meetings so held in the city of Topeka, Shawnee county, Kansas, the members of the said combination of coal operators agree upon and fix a minimum price which will be charged to persons desiring to purchase coal, and further agree that no member of the combination will sell coal any less than the minimum price so fixed at said meeting; that the agreements entered into by said combination are carried out and executed by the members thereof.

That said combination and agreements by the members thereof is a violation of section 7864 of the General Statutes of Kansas for 1901; that the following named persons have knowledge and information concerning the existence and operation of the aforesaid combination:

12 Thomas Chappel.
John Jack.
J. D. Norton.
C. J. Devlin.
Henry Isaacs.
Gust. Johnson.
Robert Elliott.
John Bell.
Arthur Summers.
John Coughlin.
Robert Buntin.
Neil Hotchkiss.
George Strunk.
O. W. Knight.
Robert Diedrich.
J. W. F. Hughes.
Gus Johnson.
Vincent Kaczynski.
A. M. Kent.
F. M. Neil.
F. M. Niel.
C. C. Nicholson.
P. J. Monahan.
F. W. Webster.
Grant C. Coughlin.
Wm. E. Tetworth, Burlingame.
John Sanderson, city.
James Washington, Burlingame.

Your informants respectfully ask that your honor cause to be issued by the clerk subpœnas for the above named witnesses to appear before said court at such time and place as your honor may fix.

C. C. COLEMAN, Att'y Gen.
OTIS E. HUNGATE, Co. Att'y.

STATE OF KANSAS, } ss:
Shawnee County, }

Otis E. Hungate, of lawful age, being first duly sworn, on his oath says that he has read the above and foregoing application and that the facts therein stated are true to the best of his information and belief.

OTIS E. HUNGATE.

Subscribed and sworn to before me this 2d day of September, 1903.

R. H. GAW,
Dep. Clerk Shawnee Co. Dist. Court.

Afterwards and on the same day and immediately following the presentation of the foregoing application to the court, an order was made by the court, which was duly spread upon the journal, and is in words and figures as follows, to-wit:

13 "The clerk of the court is directed to issue a subpœna to the sheriff of Shawnee county for the witnesses named in this application, requiring them to appear before the court on Monday, September 7, 1903, at nine o'clock a. m., to answer such questions as may be propounded to them by the attorney general or county attorney pertaining to the matters set out in this application.

Z. T. HAZEN, Judge."

Afterwards and on said 3rd day of September, 1903, there was issued from the office of the clerk of said court a subpœna, which is in words and figures as follows, to-wit:

"STATE OF KANSAS, } ss:
Shawnee County, }

The State of Kansas to John D. Jack, Greeting:

You are hereby commanded to be and personally appear before the district court in and for said county and State, on Sept. 7, 1903, at 9 o'clock a. m., at our Sept. term, 1903, at the court house in the city of Topeka, then and there to testify concerning a combination of Osage county, Kansas, coal operators for the purpose of fixing prices of coal, under chapter 265, Laws of 1897.

Hereof fail not, under penalty of the law.

Witness my hand and the seal of said district court at my office in the city of Topeka, this 3 day of Sept. 1903.

[SEAL.] I. S. CURTIS, Clerk."

Said subpœna was duly served by the sheriff of Shawnee county upon John D. Jack.

Afterwards and on the 7th day of September, 1903, said witness John D. Jack appeared in open court in person, and by Rossington, Smith & Histed, J. T. Pringle, and R. B. Gilluly, his counsel; and there appeared also at the same time C. C. Coleman, attorney general of the State of Kansas, and Otis E. Hungate, county attorney of Shawnee county, Kansas. Thereupon the said witness John D. Jack filed and presented to the court his motion to quash the subpœna which had been served upon him and to excuse him from being a witness in said investigation or proceeding, which said motion to quash is in words and figures as follows, to-wit:

14 "In the District Court of Shawnee County, Kansas.

In re Application for Subpœnas for THOMAS CHAPPELL ET AL.

Motion to Quash Subpœna.

Now comes John D. Jack, and moves the court to quash, set aside and hold for naught the subpœna served upon him in the above-entitled matter, and to excuse him from being a witness herein, for the following reasons, to-wit:

That he is a citizen of the State of Kansas and is engaged in operating a coal mine in Osage county, Kansas, and in dealing in the output of said mine and is one of the persons named in the application for subpœnas in this proceeding. The product of the mines of Osage county, Kansas, is the subject of both domestic and interstate commerce.

That said witness claims the privilege and immunity of section 10 of the bill of rights of the State of Kansas, exempting him from being a witness against himself, for the reason that in answering the questions and in submitting himself to examination as a witness he may incriminate himself and give information as to the details of the said alleged combination and agreement, and the names of parties and witnesses which might supply the means of convicting him of a crime and of subjecting him to imprisonment, fines, forfeitures and penalties.

Without in any manner waiving his immunity and privilege aforesaid, said witness further moves to quash said subpœna and objects to any further proceedings upon this application for the following reasons:

First. That chapter 265 of the Laws of 1897 is violative of that provision of the fourteenth amendment to the Constitution of the United States which provides that no State shall make or enforce

any law which shall abridge the privileges and immunities of citizens of the United States,' in that it unreasonably abridges the privileges and rights of a citizen engaged in a lawful occupation; and is further violative of that provision of said fourteenth amendment which provides that 'no State shall deprive any person of life, liberty or property without due process of law,' in that it unreasonably limits and restricts the right of private contract and of a citizen to engage in a lawful occupation; and is further violative of that provision of the same amendment which prohibits any State from denying any person within its jurisdiction the equal protection of the laws, in that it unreasonably discriminates between different classes of citizens of the United States and denies certain citizens the equal protection of the law.

Second. That section 10 of said chapter 265 of the Laws of 1897, upon which this particular proceeding is founded, is in violation of that provision of the fourteenth amendment to the Constitution of the United States which provides that 'no State shall deprive any person of life, liberty or property without due process of law,' said proceeding not being 'due process of law' in that it is not founded on either complaint, information or indictment, no complaint specifying with reasonable certainty an offense charged to have been committed has been filed, but upon testimony adduced the witness may be subjected to penalties and forfeitures provided by other provisions of the act, and that the said proceeding deprives certain citizens and classes of citizens of the United States, including this witness, of their liberty, property, privileges and immunities in a way other than by due course of the law of the land; that the said proceeding is not judicial in its character and the power attempted to be conferred upon the district court or judge in section 10 is not judicial. For the same reasons, said proceeding is further in violation of that provision of the fourteenth amendment to the Constitution of the United States which provides that no State shall deny any person within its jurisdiction the equal protection of the law.

Third. That said chapter 265 of the Laws of 1897, in so far as it is sought to be applied to the subject of this investigation, is in violation of section 8 article 1 of the Constitution of the United States conferring upon Congress the power to regulate interstate commerce.

Fourth. That said act and said section 10 thereof are in violation of section 1 of the bill of rights.

Fifth. That said act and said section 10 thereof are in violation of section 15 of the bill of rights.

Fifth. That said act is in violation of section 16 of article 2 of the State constitution, which requires that no bill shall contain more than one subject, which shall be clearly expressed in its title.

JOHN D. JACK.

ROSSINGTON, SMITH & HISTED,
R. B. GILLULY, AND
J. T. PRINGLE,
Counsel."

16 Thereupon said motion to quash was argued by counsel and submitted to the court, and at the conclusion of the argument thereon the court took the same under advisement.

Whereupon court adjourned until tomorrow morning at nine o'clock.

Afterwards and on the 8th day of September, 1903, court met pursuant to adjournment, all parties interested being present in person and by counsel.

The court overruled the motion of said witness John D. Jack to quash said subpœna; to which ruling said witness excepted.

Thereupon said JOHN D. JACK was called as a witness by the county attorney of Shawnee county, was duly sworn and placed upon the witness stand, and questions were propounded to him, answers made by him, and rulings made by the court and proceedings had as follows, to-wit:

Questions by Mr. HUNGATE, county attorney:

Q. State your name.
A. John D. Jack.
Q. Where do you live?
A. Burlingame.
Q. What is your business?
A. Coal operator.
Q. Where?
A. Burlingame.
Q. What do you mean by coal operator?
A. Owning a coal shaft and running coal business.
Q. Mining coal?
A. Yes sir.
Q. How long have you been in that business?
A. About fifteen years.
Q. Have you operated a mine continuously during the last fifteen years?
A. Pretty much.
Q. Do you know of any meetings of the operators of Osage county being held in this city at intervals during the last year?
A. Your honor, I respectfully decline to answer these questions. I claim my constitutional rights and under them I decline to answer these questions. I decline to answer upon the following grounds:

I am engaged in operating a coal mine in Osage county, Kansas, and in dealing in the output of said mines, and am one of the persons named in the application for subpœnas in this proceed-
17 ing. The product of the mines of Osage county is the subject of both domestic and interstate commerce.

I respectfully decline to answer the questions, or to testify with reference to the subject of this inquiry, for the reason that in answering the questions and in submitting myself to an examination as a

witness, I may incriminate myself and give information as to the details of the said alleged combination and agreement, and the names of parties and witnesses which might supply the means of convicting me of a crime and of subjecting me to imprisonment, fines, forfeitures and penalties, and I therefore claim the privilege and immunity of section 10 of the bill of rights.

Without in any manner waiving my immunity and privilege, I further object to any proceeding upon this application, for the following reasons:

First. That chapter 265 of the Laws of 1897 is violative of that provision of the fourteenth amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States," in that it unreasonably restricts and limits the right and priviledge of a citizen engaged in a lawful occupation; and it is further violative of that provision of said fourteenth amendment which provides that "no State shall deprive any person of life, liberty or property without due process of law," in that it unreasonably limits and restricts the right of private contract and of a citizen to engage in a lawful occupation; and is further violative of that provision of the same amendment which prohibits any State from denying any person within its jurisdiction the equal protection of the laws, in that it unreasonably discriminates between different classes of citizens of the United States and denies certain citizens the equal protection of the laws.

Second. That section 10 of said chapter 265 of the Laws of 1897, upon which this particular proceeding is founded, is in violation of that provision of the fourteenth amendment to the Constitution of the United States which provides that "no State shall deprive any person of life, liberty or property without due process of law," said proceeding not being due process of law in that it is not founded on either complaint, information or indictment, no complaint specifying with reasonable certainty an offense charged to have been committed has been filed, but upon testimony adduced the witness may be subject to penalties and forfeitures provided by other provisions of the act, and that the said proceedings deprives
18 certain citizens and classes of citizens of the United States, including myself, of their liberty, property, privileges and immunities in a way other than by due course of the law of the land; that the said proceeding is not judicial in its character, and the power attempted to be conferred upon the district judge or court in section 10 is not judicial. For the same reasons, said proceeding is further in violation of that provision of the fourteenth amendment to the Constitution of the United States which provides that no State shall deny any person within its jurisdiction the equal protection of the laws.

Third. That said act and said section 10 thereof are in violation of section 1 of the bill of rights.

Fourth. That said act and said section 10 thereof are in violation of section 15 of the bill of rights.

Fifth. That said act is in violation of section 16 of article 2 of the State constitution, which requires that no bill shall contain more than one subject, which shall be clearly expressed in its title.

The court overruled the objections made by the witness and directed the witness to answer the question.

The WITNESS: I object to answering the question for the reasons stated.

The COURT: Do you refuse to answer the question?

The WITNESS: Yes sir, for those reasons.

Q. I will ask you if you have any knowledge of a combine or an agreement being entered into by operators in coal of Osage county for the purpose of fixing the price of coal sold to residents and citizens of the State of Kansas?

A. Your honor, I decline, under the same objections, to answer any of these questions.

Q. Have you any knowledge of any meetings of coal operators of Osage county, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?

A. Your honor, I still decline to answer these questions, under the same objections.

Q. Do you know of any agreement having been entered into within this county within the last year between the operators
19 in coal who operate in Osage county, Kansas, by which they attempted to fix and settle the price of coal between themselves and citizens of Kansas?

A. Your honor, I still decline, under the same objections.

The COURT: As I understand, you decline to answer each of these questions?

The WITNESS: Yes sir.

The COURT: The court finds that the excuse given for declining to answer is insufficient.

The court thereupon instructed and directed the witness to answer the questions propounded to him, but the witness still refused to answer the questions or any one of them except as above indicated, whereupon the court made the following finding and order, towit:

"The court finds you guilty of a direct contempt of court in refusing to answer the questions, and the order of the court is that you be committed to the jail of Shawnee county until you shall answer these questions, but not beyond a period of thirty days."

The witness excepted to the ruling, finding and order of the court.

Thereupon the further hearing of this investigation or inquiry was postponed until some future date.

Thereupon there was made upon the journal of the court a record of the proceedings had in this investigation or inquiry, the same being in the form of two certain journal entries, which are respectively in words and figures as follows, to-wit:

"In the Matter of the Investigation Concerning an Alleged Combination of Coal Operators in the State of Kansas in Violation of the Anti-trust Law. No. 22415.

Now on this 7th day of September, 1903, this investigation came regularly on for hearing before the court, and there appeared C. C. Coleman, attorney general of the State of Kansas, and Otis E. Hungate, county attorney of Shawnee county, Kansas, to examine certain persons now in court who had been subpœnaed to testify as witnesses in this investigation; and there appeared also Rossington, Smith & Histed, J. T. Pringle and R. B. Gilluly, counsel for John D. Jack and John Bell, and other of said persons appearing as witnesses in obedience to the subpœnas served upon them herein.

Thereupon, said John D. Jack and John Bell, by their counsel, filed and presented to the court their separate motions to quash the subpœnas served upon them and to excuse them from testifying as witnesses herein, and said motions were argued at length by counsel. At the conclusion of said argument the court took the motions under advisement.

Z. T. HAZEN, Judge."

"In the Matter of the Investigation Concerning an Alleged Combination of Coal Operators in the State of Kansas in Violation of the Anti-trust Law. No. 22415.

Now on this 8th day of September, 1903, this investigation came on for further hearing, and all parties interested appeared as on yesterday. Thereupon the court, being now well advised in the premises, announces his ruling upon the motions to quash which were filed yesterday on behalf of said John D. Jack and John Bell, and overruled each of said motions, to which rulings said John D. Jack and John Bell duly excepted.

Thereupon John D. Jack and John Bell were separately sworn and placed upon the witness stand, and each of said parties refused to testify concerning the subject matter of this inquiry upon the ground that he could not be compelled to testify concerning the same and because the giving of the testimony and informatoin demanded by the county attorney and attorney general might incriminate the witness, might lead to his conviction of a crime, and subject him to imprisonment, fines, forfeitures and penalties, and each of said witnesses claimed immunity from examination as a witness, and upon these grounds objected to the questions propounded by

counsel. The court overruled said objections and held that said witnesses were not entitled to be relieved from testifying in this investigation, to which ruling said witnesses each for himself excepted. And said witnesses, John D. Jack and John Bell, still refused to testify in response to questions propounded to them by the county attorney, and the court found each of said witnesses guilty of a direct contempt of court in refusing to answer the questions propounded, and ordered that each of said witnesses be confined
21 in the county jail of Shawnee county until he shall be willing to answer the questions propounded, but not beyond a period of thirty days. To each and all of which proceedings, findings and orders of the court said John D. Jack and John Bell excepted.

Thereupon the further hearing of this investigation was continued and postponed until some future day.

Z. T. HAZEN, Judge."

The above and foregoing pages contain a full, true and correct record, copy and transcript of all of the papers and pleadings filed in said inquiry or investigation concerning an alleged combination of coal operators in the State of Kansas in violation of the anti-trust law, the same being designated as case or file No. 22,415, pending in the district court of Shawnee county, Kansas, a full, true and correct copy and transcript of all the testimony and evidence offered and given upon said hearing; a full, true and correct record of all objections and rulings thereon and of the exceptions saved thereto.

In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN D. JACK, Defendant. } No. 22415.

STATE OF KANSAS,
Shawnee County, } *ss:*

I, Z. T. Hahen, judge of the district court of Shawnee county, Kansas, do hereby certify that the above and foregoing was presented to me by the defendant in the above entitled cause as a bill of exceptions, and having examined the same and found it to be correct, I do now sign, settle, allow and certify the same to be a full, true and correct bill of exceptions.

In witness whereof, I have hereunto set my hand at Topeka, in said county and State, this 14th day of September, 1903, during the September term of the court for said year.

Z. T. HAZEN,
Judge of the District Court of Shawnee County, Kansas."

22 Afterwards and on the 14th day of September, 1903, during the September term of the court, there was filed in the office of the clerk a notice of appeal, which was duly served upon the clerk of the court and the service thereof acknowledged by him, the same being in words and figures as follows, to-wit:

"In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN D. JACK, Defendant. } No. 4275.

Notice of Appeal.

Filed Oct. 2, 1903. D. A. Valentine, Clerk Supreme Court.

To the clerk of the district court of Shawnee county, Kansas:

You are hereby notified that the defendant, John D. Jack, appeals to the supreme court from the judgment rendered against him in the above entitled action on the 8th day of September, 1903.

JOHN D. JACK, Defendant,
By ROSSINGTON, SMITH & HISTED,
His Attorneys.

I hereby acknowledge service of the above notice this 14th day of September, 1903.

I. S. CURTIS,
Clerk of the District Court, Shawnee County, Kansas."

Afterwards and on the 14th day of September, 1903, during the September term of the court, there was filed in the office of the clerk a notice of appeal, which was duly served upon the county attorney of Shawnee county and the service thereof acknowledged by him, the same being in words and figures as follows, to wit:

23 "In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN D. JACK, Defendant. } No. 4275.

Notice of Appeal.

Filed Oct. 2, 1903. D. A. Valentine, Clerk Supreme Court.

To the county attorney of Shawnee county, Kansas:

You are hereby notified that the defendant, John D. Jack, appeals to the supreme court from the judgment rendered against him in the above entitled action on the 8th day of September, 1903.

JOHN D. JACK, Defendant,
By ROSSINGTON, SMITH & HISTED,
His Attorneys.

I hereby acknowledge service of the above notice this 14th day of September, 1903.

OTIS E. HUNGATE,
County Attorney of Shawnee Co., Kansas."

In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN D. JACK, Defendant. } No. 4275.

STATE OF KANSAS,
Shawnee County, } ss:

I, I. S. Curtis, clerk of the district court in and for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal this 15th day of September, 1903.

[SEAL.]

I. S. CURTIS,
Clerk of the District Court.

24 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a bond for costs, which, with the endorsements thereon is in the words and figures as follows, to-wit:

25 In the Supreme Court of Kansas.

STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant. } Security for Costs.

We, and each of us, enter as security for all costs which may accrue to said appellee, or to the officers of this court herein. And in default of payment by said appellant of said costs, and after ten days' notice, we agree that execution may issue against our property for unpaid costs.

JOHN D. JACK,
By ROSSINGTON, SMITH & HISTED,
His Att'ys.

CHAS. J. DEVLIN.

(Endorsed:) No. 13,774. State *vs.* Jack. Bond for costs. Approved and filed Oct. 2 1903. D. A. Valentine, clerk supreme court. This bond is perfectly good. —— —— attorney for plaintiff in error.

26 And be it further remembered, that on the 6th day of October, A. D. 1903, the same being one of the regular judicial days of the July, 1903 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable William A. Johnston, chief justice; the Honorable William R. Smith, the Honorable Edwin W. Cunningham, the Honorable Adrian L. Greene, the Honorable John C. Pollock, the Honorable Rousseau A. Burch and the Honorable Henry F. Mason, justices, the following proceeding was had and remains of record as follows, to-wit:—

27 THE STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant. } No. 13774.

It is *ordered* that this cause be advanced for hearing upon the dockets of this court, to the December, 1903, session, and assigned for hearing on December 7th.

28 And be it further remembered, that on the 7th day of December, A. D. 1903, the same being one of the regular judicial days of the July, 1903 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable William A. Johnston, chief justice, the Honorable William R. Smith, the Honorable Edwin W. Cunningham, the Honorable Adrian L. Greene, the Honorable Rousseau A. Burch and the Honorable Henry F. Mason, justices, the following proceeding was had and remains of record as follows, to-wit:—

29 STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant. } No. 13774.

On agreement of counsel for both parties it is ordered that the further hearing of this cause be *continued* to the January, 1904, session of this court and assigned for hearing on January 5th.

30 And be it further remembered, that on the 5th day of January, A. D. 1904, the same being one of the regular judicial days of the January, 1904 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable William A. Johnston, chief justice, the Honorable William R. Smith, the Honorable Edwin W. Cunningham, the Honorable Adrian L. Greene, the Honorable Rousseau A. Burch, the Honorable Henry F. Mason and the Honorable William D. Atkinson, justices, the following proceeding was had and remains of record, as follows, to-wit:

31 THE STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant. } No. 13774.

This cause comes on to be heard on the notice of appeal and the transcript of the record of the district court of Shawnee county: and thereupon after oral argument by R. B. Gilluly for the appellant and by E. A. Austin and C. C. Coleman, attorney general, for the State, said cause is *submitted* on brief of counsel for both parties and taken under advisement by the court.

32 And be it further remembered, that on the 7th day of May, A. D. 1904, the same being one of the regular judicial days of the January, 1904 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable William A. Johnston, chief justice, the Honorable William R. Smith, the Honorable Edwin W. Cunningham, the Honorable Adrian L. Greene, the Honorable Rousseau A. Burch, the Honorable Henry F. Mason and the Honorable William D. Atkinson, justices, the following proceeding was had and remains of record, as follows, to-wit:

33 THE STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant. } No. 13774.

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be *affirmed*.

It is further ordered that the appellant pay the costs of this case in this court, taxed at $23.15 and hereof let execution issue.

34 And also on the said 7th day of May, A. D. 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, the syllabus and opinion of said court in this cause, which syllabus and opinion are in words and figures as follows, to-wit:—

35 THE STATE OF KANSAS
v.
JOHN D. JACK. } No. 13774. Appeal from Shawnee County. Affirmed.

Syllabus.

By the Court, Atkinson, J.

1. A proceeding before the district court or district judge upon the written application of the county attorney or attorney general, under section 10 of chapter 265, Laws of 1897 (Gen. Stat. 1901, sec. 7873) to take the testimony of witnesses as to their knowledge of violations of what is known as the "anti-trust law," is of the nature of an investigation or preliminary proceeding, is a valid exercise of judicial power, and the proceedure due process of law.

2. That portion of section 10 of the bill of rights, that "no person shall be a witness against himself" cannot be claimed by a witness when by the terms of an immunity statute the immunity afforded is co-extensive with the constitutional privilege of silence.
3. The immunity afforded by section 10 of chapter 265, Laws of 1897, to a witness subpœnaed to testify in a proceeding or inquiry, of his knowledge of violations of the anti-trust law, is co-extensive with the constitutional privilege that no person shall be a witness against himself.
4. A witness subpœnaed to testify in a proceeding or inquiry, of his knowledge of violations of the State anti-trust law, (chapter 265, Laws of 1897), cannot refuse to testify on the claim that the immunity afforded by section 10 of the act does not afford pro-
36 tection against the possibility of his evidence being used against him in a prosecution for violations of the Federal anti-trust law.
5. The provision of section 5 of chapter 265, Laws of 1897, that every person, company or corporation violating any of the provisions of the act within the State, is denied the right and is prohibited from doing any business within the State, contemplates prohibiting only the continuing of business or the engaging in business in the State, in violation of the act.
6. The provision of section 7 of chapter 265, Laws of 1897, that in any civil action there may be pleaded in defense that the plaintiff or any person interested in the prosecution, has within one year been guilty of a violation of any of the provisions of the act, contemplates only civil actions relating to and growing out of transactions prohibited by the act.
7. Chapter 265, Laws of 1897 (Gen. Stat. 1901, secs. 7864–7874) is not in contravention of the provisions of the fourteenth amendment of the Constitution of the United States, and is a valid exercise of legislative power.

All the justices concurring.

A true copy.
Attest:—

——— ———,
Clerk Supreme Court.

37 THE STATE OF KANSAS v. JOHN D. JACK. } No. 13774. Appeal from Shawnee District Court. Affirmed.

The opinion of the court was delivered by ATKINSON, J.:

This is an appeal by John D. Jack from a judgment of imprisonment for contempt, in the district court of Shawnee county. Appellant as a witness, refused to answer certain questions in a proceeding or investigation in that court concerning the existence of com-

binations of coal operators, in violation of the anti-trust law, and was adjudged guilty of contempt.

On September 3, 1903, the attorney general and the county attorney of Shawnee county, proceeding under section 10 of chapter 265, Laws of 1897 (Gen. Stat. 1901, sec. 7873), filed in the district court of Shawnee county their verified application, informing the court of the existence of combinations of persons engaged in the operation of coal mines in Osage county to fix the price of coal at the mines, and the price to be charged to purchasers. It was therein averred that the members of said combinations had a meeting place in said county of Shawnee where they met monthly and fixed a minimum price to be charged for coal; that the members of said combinations would not sell coal for less than the minimum price fixed at said meetings and that the agreements entered into by said combinations were carried out and executed by the members thereof. Among others named in said application as having a knowledge concerning the existence of these combinations and from whom it was therein asked that a subpœna issue, was appellant. The district judge upon said application, awarded subpœnas. The court overruled the motion of appellant to quash the subpœna issued. Appellant pursuant to said subpœna appeared in court as a witness and was asked the following questions:

38 "Q. Do you know of any meetings of the operators of Osage county being held in this city (Topeka) at intervals during the last year?"

"Q. I will ask if you have any knowledge of a combine or an agreement being entered into by operators in coal of Osage county for the purpose of fixing the price of coal sold to residents and citizens of Kansas?"

"Q. Have you any knowledge of any meetings of coal operators of Osage county, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?"

"Q. Do you know of any agreement having been entered into within this county within the last year between the operators in coal who operate in Osage county, Kansas, by which they attempted to fix and settle the price of coal between themselves and citizens of Kansas?"

Appellant refused to answer each of the foregoing questions and assigned the following as his reasons for such refusal:

"I am engaged in operating a coal mine in Osage county, Kansas, and in dealing in the output of said mines, and am one of the persons named in the application for subpœnas in this proceeding. The product of the mines of Osage county is the subject of both domestic and interstate commerce. I respectfully decline to answer the questions, or to testify with reference to the subject of this inquiry, for the reason that in answering the questions and in submitting myself to an examination as a witness, I may incriminate

myself and give information as to the details of the said alleged combination and agreement, and the names of parties and witnesses which might supply the means of convicting me of a crime and of subjecting me to imprisonment, fines, forfeitures and penalties, and I therefore claim the privilege and immunity of section 10 of the bill of rights."

The "anti-trust law," chapter 265, Laws of 1897 (Gen. Stat. 1901, secs. 7864–7874) is vigorously assailed. It is charged that the act is in violation of the fourteenth amendment to the Federal Constitution in this, that it is a depriving of liberty without due process of law; a taking of property without due process of law; and a denial of the equal protection of the law, contrary to the guaranties of said constitutional amendment. It is also charged that to require appellant to answer the foregoing questions, for the refusal to answer which he was adjudged guilty of contempt, is to deprive him of the rights, privileges and immunities guaranteed by section 10 of the bill of rights.

The motion to quash the subpœna, raised the question whether the proceedings upon application and the issuing of subpœnas thereunder, as provided by section 10 of the anti-trust law, is due process of law within the meaning of the fourteenth amendment to the Federal Constitution.

39 Section 10, being section 7873, General Statutes 1901, reads:

"The several district courts of this State and the judges thereof shall have jurisdiction, and it shall be their duty, upon good cause shown and upon written application of the county attorney or the attorney general, to cause to be issued by the clerk of said court subpœnas for such witnesses as may be named in the application of a county attorney or the attorney general, and to cause the same to be served by the sheriff of the county where such subpœna is issued; and such witnesses shall be compelled to appear before such court or judge at the time and place set forth in the subpœna, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person subpœnaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpœnaed shall be taken down by the reporter of said court, and shall be transcribed and placed in the hands of the county attorney or the general attorney, and he shall, in the proper courts, at once prosecute such violator or violators of this act as the testimony so taken shall disclose. Witnesses subpœnaed as provided for in this section shall be compelled to attend from any county in the State."

It is urged by appellant that the proceeding upon application provided by said section 10 is not judicial in its character, and is

not due process of law, in that it is not founded on either complaint, information or indictment.

District courts are expressly provided for by the Constitution and are therein given such jurisdiction as may be provided by law (Const. sec. 6, art. 3). The extent of their jurisdiction and the character of their procedure are left to the legislature. District judges are expressly provided for by the Constitution. They are therein given such jurisdiction at chambers as may be provided by law. (Const. sec. 16, art. 3.) The extent of their jurisdiction being left to the legislature.

The wide scope given to the States in the matter of their judicial tribunals and the character of their procedure, as recognized by the Federal Government, is clearly set forth in the opinion of the court by Mr. Justice Brewer in case of Brown *v.* New Jersey, 175 U. S., 172, where it is said:

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. (*Ex parte* Reggel, 114 U. S., 642; Iowa Central Railway *v.* Iowa, 160 U. S., 389; Chicago, Burlington & Quincy Railroad *v.* Chicago, 166 U. S., 226.) 'The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding." Missouri *v.* Lewis, 101 U. S., 22, 31." * * *

"A perfectly satisfactory definition of due process may perhaps not be easily stated. In Hurtado *v.* California, 110 U. S., 516, 537, Mr. Justice Matthews, after reviewing previous declarations, said: 'It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.' In Leeper *v.* Texas, 139 U. S. 462, 468, Chief Justice Fuller declared 'that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied.'"

Section 1923, General Statutes 1901, gives to district courts general original jurisdiction of all matters both civil and criminal, not otherwise provided by law. Section 1924, provides that district judges shall have and exercise such power in vacation or at chambers as may be provided by law * * * and to punish for contempt in open court or at chambers * * *. The right of the district courts and district judges to punish for contempt, and without a jury, is well recognized. *In re* Millington 24 Kas., 214; State

v. Durein, 46 Kas., 695; A. & E. Encycl. of L. 7, (2d, ed. 66.) In matters of contempt a jury is not required by due process of law. (Interstate Commerce Comm. v. Brimson, 154 U. S., 447). The legislature has by section 10 of the anti-trust act conferred upon district courts and district judges jurisdiction, upon written application to cause to be issued by the clerk of the court subpœnas for witnesses, to compel their attendance in obedience thereto and to punish for contempt for a refusal to testify. In the case of Interstate Commerce Comm. v. Brimson, *supra*, the court upheld a somewhat analogous provision of the interstate commerce act, wherein the circuit court is given power to entertain an application of the commission, issue subpœnas, examine and commit for contempt in cases where the witness refuses to testify. The procedure under said section 10 is an investigation or preliminary proceeding, and can result
41 in no final judgment, aside from a proceeding in contempt against a recalcitrant witness, except as the consequence of a regular judicial trial conducted in the manner provided by statute. It is a valid exercise of judicial power and the procedure due process of law.

The case of State v. Smiley, 65 Kas., 240, was an appeal from a judgment of conviction for a violation of the anti-trust law. It was there charged that the act imposed such limitations upon freedom of contract as to constitute a deprivation of the right of property, contrary to the fourteenth amendment of the Federal Constitution. This court in that case held, that the act did not conflict with the guaranty of right to acquire property by lawful contract secured by the Federal Constitution, and that the act was a valid exercise of legislative power.

It is contended by appellant that to have answered upon the investigation before the district court the foregoing questions, for the refusal to answer which he was adjudged guilty of contempt, would have deprived him of the privileges and immunities guaranteed to him by section 10 of the bill of rights. The provision of the bill of rights by him relied upon reads, "No person shall be a witness against himself." This right is not only a constitutional right, but it is one of the fundamental principles of the common law, embodied in a maxim, that no man can be compelled to criminate himself.

The proceeding before the district court was of the nature of an investigation to inquire whether there had been criminal violations of the anti-trust law. If appellant was guilty of any of the offenses of which inquiry was made by the questions he refused to answer, he himself was liable to criminal prosecution under this law. He assigned as a reason for his refusal to answer the questions that in doing so he might incriminate himself under the anti-trust law, he being an operator of coal mines in the State, and dealing in the output of these mines. The legislature by section 10 of the anti-trust law provided immunity to witnesses subpœnaed to give information concerning violations of the act in the following language: "Any person subpœnaed and examined shall not be liable to criminal

prosecution for any violation of this act about which he may
42 testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding." Was appellant as a witness upon the investigation entitled to invoke the protection of section 10 of the bill of rights? Was he entitled to plead the privilege of silence? If the immunity against prosecution provided by section 10 of the anti-trust law affords the witness upon such investigation the protection against future prosecutions that is guaranteed to him by section 10 of the bill of rights, then appellant was not entitled to invoke the protection of section 10 of the bill of rights; was not entitled to plead the privilege of silence. (Counselman v. Hitchcock, 142 U. S., 547; Brown v. Walker, 161 U. S., 591.)

There is no claim that it is beyond the power of the legislature of the State to grant amnesty to witnesses against future prosecutions for violations of the laws of the State. It is well settled that legislative bodies possess the power to grant amnesty to witnesses and compel them to give testimony against themselves. This power has been recognized as a public necessity in the enforcement of laws. Congress, and the legislature of many of the States, have enacted immunity statutes for the purpose of securing conviction for offenses such as gambling, bribery, the manufacture or sale of intoxicating liquors, usury, combinations in restraint of trade, and other like offenses in which two or more persons participate to constitute the crime. The necessities of the case and the difficulty of obtaining witnesses to establish the offense, punish the offenders and suppress the crime being deemed sufficient to warrant the extending of immunity to a participant to constitute him a competent witness to be used against the remaining offenders. The constitutional privilege that a person shall not be required to be a witness against himself is one of great value to the citizen. However, the authorities, State and Federal, recognize the rule that when the testimony sought cannot by reason of an immunity statute be used as a basis for or in aid of a prosecution which might result in fine or impris-
43 onment or involve a a penalty or forfeiture, the reason for the rule ceases and the privilege cannot be claimed. Immunity statutes must be given a reasonable construction and not a strained and artificial one and when it is apparent to the court that a person is fully protected from the effect of his testimony he should be required to give evidence, even though it may show him to have been guilty of a criminal offense. It is claimed however that the immunity afforded by section 10 of the anti-trust law is not sufficient to constitute a substitute for the privilege of silence guaranteed the witness by section 10 of the bill of rights.

The legislature determines what acts of the individual shall constitute a crime against the State, and what shall constitute the punishment of an offender upon conviction. It determines within what period a prosecution for the commission of an offence must be commenced, and may determine, within constitutional limitation what

shall, and what shall not constitute competent evidence to be used upon a trial for the punishment of an offender. The protection afforded the witness by the Constitution is that of not being a witness against himself. If the act of which inquiry is made does not constitute a crime; or if made a crime, has no punishment prescribed for its violation or is no longer punishable; or, if the act is barred by the statute of limitation, with no action pending, or has been repealed; or, if the witness has been tried for the offense and acquitted; or convicted and satisfied the sentence imposed by the law, he could claim no exemption from answering questions relating thereto. Likewise is the witness deprived of claiming this exemption from giving evidence if the legislature by the enactment of an immunity statute has provided that he shall not be liable to criminal prosecution for any violation of the act about which he may testify nor his evidence be used against him in any criminal proceeding. As to those crimes to which his evidence relates or might be used, under the immunity act the witness is in the same position in so far as there is a possibility of using his evidence against him, as though there were no such crimes provided by
44 statute. Section 4 of the act provides, that for a violation of any of the provisions of the act by a corporation or any of its officers or agents, the corporation shall upon proper proceedings therefor forfeit its charter, rights and franchises. It is urged that the amnesty provided by section 10 is not complete, as it affords no immunity to a stockholder in any such corporation. There is nothing in the record disclosing appellant to be a stockholder, an officer or agent, or otherwise connected with any corporation that may in any manner be affected or suffer as the result of his disclosure as a witness. The constitutional provision was intended for the protection of the witness. The hurt must be his own. He must himself be included in the terms of the law before he has just grounds for complaint. State *v.* Smiley, 65 Kas., 240. However, it was never intended that the immunity afforded the witness by the act, should extend to and protect the stockholders, officers and agents of a corporation, as such. The immunity extends to the witness alone. It was not contemplated that it should be made use of as a pretext for securing immunity to others. That the immunity afforded the witness, to be complete, must extend to the officers, agents and stockholders of a corporation as contended for by appellant, is too remote. Immunity statutes must be given a reasonable construction and not a strained or artificial one. Section 5 provides as a punishment for one convicted of a violation of the act, a fine of not less than $100 nor more than $1000 and confinement for not less than 30 days nor more than 6 months. Sections 5 and 6 provide a penalty of $100 per day for each and every day such violation continues, after conviction. There is a further provision of section 5 that every person, company or corporation violating any of the provisions of the act within the State, are denied the right and are prohibited from doing any business within the State. This latter

provision contemplates prohibiting only, the continuing of business or the engaving in business in the State, in violation of the act. It was not intended thereby to prohibit persons continuing or engaging in any lawful business in the State not conducted or carried on in violation of the act. Viewed in
45 the light of the interpretation thus given it, the provision is a valid exercise of legislative power and is not open to the charge made against it by appellant that it constitutes in effect banishment from the State. The provision of section 7, that in any civil action there may be pleaded in defense that the plaintiff or any person interested in the prosecution has within one year been guilty of a violation of any of the provisions of the act, as held in Barton *v.* Mulvane, 59 Kas., 313 under a very similar provision of the anti-trust act of 1889, contemplates only civil actions relating to and growing out of transactions prohibited by the act. It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property, rights and interests not connected with such combinations or trusts. Thus interpreted the provision is a valid exercise of legislative power and is not open to the charge of appellant that it constitutes outlawry.

It was the intention of the legislature by section 10 of the act to afford the witness complete immunity against criminal prosecution, fines, imprisonment, penalties and forfeitures for any violation of the act about which the witness might give evidence upon a proceeding or investigation by the State to acquire information as to violations of the act; and also to afford complete immunity against the testimony given by the witness being used against him in any proceeding of a criminal nature. The immunity afforded by the act is coextensive with the constitutional privilege that no person shall be a witness against himself. A statute providing such immunity is sufficient. A witness thus protected cannot invoke the constitutional privilege of silence. (Counselman *v.* Hitchcock, *supra;* Brown *v.* Walker, *supra;* People *v.* Butler Street Foundry, 201 Ill., 236; Bradley *v.* Clark, 133 Cal., 196.)

Appellant assigned as a further reason why he should not answer the questions propounded to him for the refusal to answer which he
46 was adjudged guilty of contempt, that the immunity afforded by section 10 of *of* the anti-trust act, did not protect him against criminal prosecution, fines and forfeitures for violations of the Federal anti-trust law. The proceeding before the court was an investigation to inquire whether there had been a violation of the State anti-trust law. Appellant as a witness in the district court upon the inquiry, stated that the product of the mines of Osage county was the subject of both domestic and interstate commerce.

If the product of the mines of Osage county was, as stated, the subject of interstate commerce, and appellant as an operator of these mines in their operation violated the provisions of the Federal anti-trust law and thereby became liable to criminal prosecution, fines and forfeitures thereunder, could he in an investigation in the State

courts to inquire if there had been violations of the State anti-trust law, refuse to testify, if the immunity provided by section 10 did not protect him against the possibility of criminal prosecution, fines and forfeitures for violations of the Federal anti-trust law? It is not to be presumed that the examination upon inquiry will go beyond violations of the State anti-trust law? If such examination be confined to its legitimate scope it will not include but will exclude all acts which would connect it with interstate commerce in violations of the Federal anti-trust law. Under its power to regulate interstate commerce, the United States may legislate upon the subject of private contracts relating to such commerce, and prohibit combinations, pools and trusts so far as they relate to interstate commerce but has no jurisdiction over combinations, pools and trusts, relating to commerce wholly within the State. Nor does the United States acquire jurisdiction over that part of a combination or agreement relating wholly to commerce within a State by reason of the fact that the combination also covers and regulates commerce, which is interstate. In so far as such combinations interfere with interstate commerce, they are under the control of the United States. In so far as they interfere with commerce wholly within the State,
47 such combinations are subject only to the jurisdiction of the State. (Addyston Pipe & Steel Co. *v.* U. S., 175 U. S., 211.)

Where two governments like the United States and a State exercise their authority within the same territory, and over the same citizens, the legislation of that which as to certain subjects is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded. (Commonwealth *v.* Gagne, 153 Mass., 205.)

In case of Brown *v.* Walker, *supra*, Brown who was auditor of the Alleghany Railway Co., was subpœnaed as a witness to give testimony before the Federal grand jury upon an investigation concerning alleged violations of the interstate commerce act by the railway company. He refused to testify claiming that to answer the questions would tend to accuse and incriminate him. He was adjudged to be in contempt. *Habeas corpus* proceedings were instituted in the United States circuit court and he was by that court remanded to the custody of the marshal. An appeal was had to the United States Supreme Court. It was by appellant claimed that the immunity provided by the interstate commerce act was insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself. The immunity provided by the act was by the court held sufficient. Mr. Justice Brown in delivering the opinion of the court, with reference to the construction of the immunity clause of the act, said:

"It can only be said in general that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testi-

mony, nor to unduly impede, hinder, or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not to hold the law invalid unless, as was observed by Mr. Chief Justice Marshall in Fletcher *v.* Peck, 10 U. S. 6 Cranch, 87, 128 (3:162, 173), 'the opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.'"

48 It is further claimed, in Brown *v.* Walker, *supra*, that the amnesty provided for by the interstate commerce act, if sufficient to grant immunity from prosecution by the Federal courts, did not afford immunity against prosecution in the State courts. In treating the proposition and the improbability of being subjected to the criminal laws of another sovereignty, after having quoted extensively with approval from the opinion of Lord Chief Justice Cockburn upon that subject, Mr. Justice Brown said:

"But even granting that there was still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in Reg. *v.* Boyes, 1 Best & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate. The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to indemnity against the State, or even against the prosecutor if the action of the latter was taken in good faith and in a reasonable belief that he was justified in so doing."

The anti-trust act of Illinois requires corporations doing business in the State to make and file annually with the secretary of state what is termed an anti-trust affidavit. In People *v.* Butler Street Foundry, *supra*, an action to recover the penalty of $50 per day for a fail-

ure to make and file such affidavit, as a defense to such action, it was charged that to require the making of the affidavit was a violation of the constitutional provision of the State, that "no person shall be compelled in any criminal case to give evidence against himself." The act provided immunity against criminal prosecution for truthful disclosures of matters required by the affidavit. The affidavit required a disclosure of any connection of the corporation with any combinations, pools, trusts, etc. in restraint of trade or commerce. It was urged that the immunity was not co-extensive with the constitutional privilege, and that it did not cover prosecutions
49 under laws of other States or of the laws of the United States.

In passing upon the validity of the anti-trust act, it was held that while the act might be broad enough to include trusts, pools and combines formed with parties outside of the State, yet in construing the act the court must consider it as relating to trusts, pools and combines formed within the State. As to the sufficiency of the immunity challenged, it was held, that it was complete against prosecution by the Federal authorities or the authorities of other States, since the affidavit required, to the making of which immunity was extended, need relate only to trusts, pools and combines within the State. In making reference to the sufficiency of the immunity afforded by the act, as applied to violations of the Federal anti-trust law, the court said: "The possibility that the affidavit required by section 7*a* of the anti-trust act of 1891 might contain disclosures tending to show a violation of the anti-trust law of some other State or of the United States, is not a real and probable danger of criminal prosecution within the constitutional privilege against giving self incriminating evidence."

The anti-trust law (chap. 265, Laws of 1897), is a valid exercise of legislative power and is not as claimed by appellant, violative of the fourteenth amendment of the Federal Constitution. Section 10 of the act contemplates that in the proceeding or investigation before the district court or district judge to inquire if there had been violations of the State anti-trust law, the inquiry will be confined to violations of that law. The record discloses the examination of appellant upon the inquiry to have been confined to its legitimate scope. Within the scope of the inquiry, the immunity afforded appellant by section 10 was co-extensive with the constitutional privilege invoked for his protection. The possibility that his answers to the inquiries might disclose violations of the Federal anti-trust law and the evidence thus given be used against him in a crimi-
50 nal prosecution for a violation of that law, was not a real and probable danger of criminal prosecution within the constitutional privilege that no person shall be a witness against himself. Appellant should have answered the questions asked him upon the inquiry. The judgment of the court below is affirmed.

All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

51 And afterward, on the 21st day of May, A. D. 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for writ of error, together with the assignments of error of the appellant herein, which, with the endorsements thereon are in words and figures as follows, to-wit:—

52 In the Supreme Court of the State of Kansas.

STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant.

Petition for Allowance of Writ of Error.

Now comes the appellant John D. Jack and conceiving himself aggrieved by the judgment made and entered in the above entitled cause on the 7th day of May, 1904, wherein and whereby the judgment of the district court of Shawnee county adjudging appellant to be guilty of contempt of court and punishing him therefor, was affirmed, does hereby pray for the allowance of a writ of error from said judgment to the Supreme Court of the United States for the reason specified in the assignment of errors filed herein.

And appellant prays that this writ of error may be allowed and that a transcript of the record and proceedings may be forthwith transmitted to the said Supreme Court of the United States as provided by law.

ROSSINGTON, SMITH & WEST,
CLIFFORD HISTED,
J. T. PRINGLE, &
R. B. GILLULY,
Attorneys for Appellant.

53 In the Supreme Court of the State of Kansas.

STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant.

Assignments of Error.

Now comes the appellant, John D. Jack, and makes the following assignments of error in connection with his petition for a writ of error in the above entitled cause:

I.

The court erred in holding that notwithstanding the testimony of appellant might incriminate him under the act of Congress of July

2nd, 1890 commonly known as the anti-trust act, he was still compelled to testify. Section 10 of chapter 265 of the Laws of 1897, as thus construed by the supreme court of Kansas, is in violation of that provision of the fourteenth amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

II.

Section 10 of chapter 265 of the Laws of 1897 as thus construed by the supreme court is further in violation of that provision of the fourteenth amendment of the Constitution of the United States which provides that "nor shall any State deprive any person of life, liberty or property without due process of law."

III.

That the said section as construed by the supreme court is also violative of the further provision of the fourteenth amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."

54 IV.

The procedure prescribed by section 10 of chapter 265 and under which the judgment of conviction was pronounced against him, is not due process of law within the meaning of the fourteenth amendment of the Constitution of the United States, and the supreme court of Kansas erred in holding to the contrary and overruling and denying the protection and immunity invoked by appellant in that behalf.

V.

That chapter 265 of the Laws of 1897 in its entirety is violative of that provision of the fourteenth amendment to the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" in that it unreasonably restricts and limits the rights and privileges of a citizen engaged in lawful occupation.

VI.

Chapter 265 of said Laws is further violative of the fourteenth amendment which provides that "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" in that it unreasonably limits and restricts the right of private contract and of citizens to engage in lawful occupation, and in that it unreasonably discriminates between different classes of

citizens of the United States and denies certain citizens the equal protection of the laws.

VII.

That the judgment of the supreme court of Kansas is erroneous in that it denies to the appellant the protection guaranteed to him by the fourteenth amendment to the Constitution of the United States in the particulars hereinbefore pointed out.

ROSSINGTON, SMITH & WEST,
CLIFFORD HISTED,
J. T. PRINGLE,
R. B. GILLULY,
Attorneys for Appellant.

55 [Endorsed:] 13774 State v. Jack Petition for writ of error Filed May 21 1904 D. A. Valentine clerk supreme court. Harkless, Crysler & Histed, lawyers, Kansas City, Mo.

56 And be it further remembered, that on the 21st day of May, A. D. 1904, the same being one of the regular judicial days of the January, 1904, term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable William A. Johnston, chief justice, the Honorable William R. Smith, the Honorable Edwin W. Cunningham, the Honorable Adrian L. Greene, the Honorable Rosseau A. Burch, the Honorable Henry F. Mason and the Honorable William D. Atkinson, justices, the following proceeding was had and remains of record, as follows, to-wit:

57 STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant.
} No. 13774.

Now on this 21st day of May, 1904, comes the appellant and files his assignment of errors and petition for writ of error and prays for the allowance of a writ of error in said cause.

Whereupon it is ordered that the said writ of error be and it is hereby allowed and that a certified transcript of the record and proceedings herein be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the supersedeas bond be affixed at the sum of five hundred ($500.00) dollars.

58 And afterward, on the 24th day of May, A. D. 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, a writ of error, which with the allowance thereof and the endorsements thereon, is in the words and figures as follows, to-wit:

59 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the justices of the supreme court of the State of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of Kansas, before you, being the highest court of law and equity in said State in which a decision could be had in said suit between The State of Kansas, appellee, and John D. Jack, appellant, wherein a right, privilege and immunity were and are claimed under the Constitution and statutes of the United States, and the decision was against the right, privilege and immunity claimed thereunder, a manifest error hath happened to the great damage of said John D. Jack as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at Washington, on or before the 23rd day of June, 1904, next, in said Supreme Court, to be then and there held, to the end that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 24th day of May, in the year of our Lord one thousand, nine hundred four.

Issued at office in the city of Topeka, with the seal of the
60 circuit court of the United States for the first division of the judicial district of Kansas.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT, Clerk.

Allowed:

W. A. JOHNSTON,
Chief Justice of the Supreme Court
of the State of Kansas.

61 [Endorsed:] No. 13,774. Writ of error. Filed May 24, 1904. D. A. Valentine, clerk supreme court.

62 And also, on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a citation, together with an acknowledgement of the service of the same,

which, with the endorsements thereon is in the words and figures as follows, to wit:—

63 The United States of America to the State of Kansas:

You are hereby cited, and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein John D. Jack is plaintiff in error and The State of Kansas is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable William A. Johnston, chief justice of the supreme court of the State of Kansas, this 24th day of May, 1904.

W. A. JOHNSTON,
Chief Justice of the Supreme Court
of the State of Kansas.

I accept service of the above this 24th day of May, 1904.

C. C. COLEMAN,
Attorney General of the State of Kansas.

I accept service of the above this — day of ——, 1904.

——— ———,
County Attorney of Shawnee County, Kansas.

May 24, 1904.

O. E. HUNGATE, Co. Att'y.

Filed May 24, 1904.

D. A. VALENTINE,
Clerk Supreme Court.

64 [Endorsed:] No. 13,774. Citation. Filed May 24, 1904. D. A. Valentine, clerk supreme court.

65 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a supersedeas bond which, with the approval thereof and the endorsements thereon is in words and figures as follows, to-wit:—

66 In the Supreme Court of the State of Kansas.

STATE OF KANSAS, Appellee,
vs.
JOHN D. JACK, Appellant.

Know all men by these presents, that we, John D. Jack as principal, and Charles J. Devlin as surety, are held and firmly bound unto the State of Kansas in the sum of five hundred dollars ($500.00),

for the payment of which well and truly to be made we bind ourselves, jointly and severally, and our heirs, executors and administrators, firmly by these presents.

Sealed with our seal- this — day of May, A. D., 1904.

Whereas, the above named John D. Jack has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas,

Now, therefore, the condition of this obligation is such that if the above named John D. Jack shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and effect.

JOHN D. JACK.
CHARLES J. DEVLIN.

Approved:
W. A. JOHNSTON,
Chief Justice of the Supreme Court
of the State of Kansas.

Endorsed: No. 13774.—Supersedeas bond. Filed May 24 1904 D. A. Valentine clerk supreme court.

67 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, Appellee,
v.
JOHN D. JACK, Appellant. } No. 13774.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed and all proceedings had in the above entitled cause, as the same now remain on file and of record in my office.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 14th day of June A. D. 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

68 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, Appellee,
v.
JOHN D. JACK, Appellant. } No. 13774.

Pursuant to a writ of error issued out of the United States circuit court for the district of Kansas, on the 24th day of May, A. D. 1904, and directed to the supreme court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record, and proceedings of this court, in the within entitled cause, with all things concerning the same.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 14th day of June A. D. 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 19,405. Kansas supreme court. Term No. 305. John D. Jack, plaintiff in error, *vs.* The State of Kansas. Filed June 27, 1904. File No. 19,405.

FILE COPY.

Supreme Court U. S.
FILED
NOV 7 1904
JAMES H. McKENNEY,
Clerk

No. 54.

IN THE SUPREME COURT

OF THE

UNITED STATES.

John D. Jack, Plaintiff in Error,

vs.

The State of Kansas, Defendant in Error.

In Error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR, JOHN D. JACK.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
Attorneys for Plaintiff in Error.

J. T. PRINGLE,
R. B. GILLULY,
Of Counsel.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

John D. Jack,	Plaintiff in Error,	No. 305.
vs.		
The State of Kansas,	Defendant in Error.	

In Error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR, JOHN D. JACK.

Statement of the Case.

This is a writ of error to the Supreme Court of the United States to review a decision of that Court in the matter of John D. Jack in a proceeding in *habeas corpus* to be released from commitment under the order of the District Court of Shawnee County, Kansas, and in an appeal prosecuted from a ruling and decision of the Supreme Court of Kansas requiring the said Jack to testify in an *ex parte* inquisition instituted by the attorney general of the State and the county attorney of

Shawnee County, Kansas, under section 10 of chapter 265 of the Laws of 1897, commonly known as the Kansas Anti-trust Act.

This Court has recently had this act under consideration in the case of *Smiley v. State of Kansas*, reported in 196 U. S. 447. Certain questions involved in this appeal were decided in that case.

The particular provision of the act, however, under which the inquisition was brought which gave birth to the present contention, was not under the consideration of the Court in the Smiley case, and, so far as may be gathered from that case, was not passed upon by the Court.

It will be seen in this record that in the Court below, however, we attacked the constitutionality of the Kansas Anti-trust Act upon grounds similar to those involved in the Smiley case, and to the extent that the Smiley case is decisive of those contentions they are and will be eliminated from this argument.

It is unnecessary, therefore, to direct the Court's attention to the statute beyond the section under which the attorney general and the county attorney sought to act. That section is as follows:

"Jurisdiction.—The several District Courts of this State and the judges thereof shall have jurisdiction, and it shall be their duty, upon good cause

shown and upon written application of the county attorney or the attorney general, to cause to be issued by the clerk of said Court subpœnas for such witnesses as may be named in the application of a county attorney or the attorney general, and to cause the same to be served by the sheriff of the county where such subpœna is issued; and such witnesses shall be compelled to appear before such court or judge at the time and place set forth in the subpœna, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who fails or refuses to attend and testify shall be punished as for contempt as provided by law. Any person subpœnaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpœnaed shall be taken down by the reporter of said Court, and shall be transcribed and placed in the hands of the county attorney or the attorney general, and he shall, in the proper courts, at once prosecute such violator or violators of this act as the testimony so taken shall disclose. Witnesses subpœnaed as provided for in this section shall be compelled to attend from any county in the State."

This section appears also as paragraph 7873 of the General Statutes of Kansas of the year 1901.

On September 3, 1903, the attorney general and county attorney filed in the District Court of Shawnee County an application for subpœnas, charging (see page 22 of the Record):

"That a combination of the persons engaged in

operating coal mines in Osage County, Kansas, and in dealing in the output of said mines in Osage County, Shawnee County, and other counties throughout the State, exists, the object of which is to fix the price of coal at the mines, and which does in fact fix the price of coal which shall be charged to purchasers at their said mines; that the said combination of persons has its regular meeting place in the city of Topeka, Shawnee County, Kansas, and that said combination meets and has met for a year next preceding the filing of this application on the last Saturday night of each month; that at said meetings so held in the city of Topeka, Shawnee County, Kansas, the members of the said combination of coal operators agree upon and fix a minimum price, which will be charged to persons desiring to purchase coal, and further agree that no member of the combination will sell coal any less than the minimum price so fixed at said meeting; that the agreements entered into by said combination are carried out and executed by the members thereof."

Among others who were named as witnesses in said application, having knowledge of the existence of the alleged combination, was the plaintiff in error, John D. Jack.

Pursuant to the application, the District Judge awarded subpœnas, which were served, among others, upon this plaintiff in error. These subpœnas recited the object of the inquiry as follows:

"Then and there to testify concerning a combination of Osage County, Kansas, coal operators for the purpose of fixing prices of coal, under chapter 265 of the Laws of 1897."

On September 7, 1903, the plaintiff in error appeared in the District Court of Shawnee County, with other witnesses, and filed a motion to quash the subpœnas (see page 10 of the Record). The motions were overruled, and thereupon they were placed upon the stand as witnesses and refused to answer certain inquiries propounded to them, for the same reasons as those contained in the motion to quash. It is elicited from the plaintiff in error that he was a coal mine operator owning a coal shaft and conducting the business of mining coal in Osage County and selling the same. Thereupon the witness was asked the following questions (p. 22, Record):

"Q. Do you know of any meetings of the operators of Osage County being held in this city at intervals during the last year?

Q. I will ask if you have any knowledge of a combine or an agreement being entered into by operators in coal of Osage County for the purpose of fixing the price of coal sold to residents and citizens of the State of Kansas?

Q. Have you any knowledge of any meetings of coal operators of Osage County, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?

Q. Do you know of any agreement having been entered into within this county within the last

year between the operators in coal who operate in Osage County, Kansas, by which they attempted to fix and settle the price of coal between themselves and the citizens of Kansas?"

The witness declined to answer each of the questions and gave his reasons for declining. Among others he stated:

"I am engaged in operating a coal mine in Osage County, Kansas, and in dealing in the output of said mines, and am one of the persons named in the application for subpœnas in this proceeding. The product of the mines of Osage County is the subject of both domestic and interstate commerce.

I respectfully decline to answer the questions, or to testify with reference to the subject of this inquiry, for the reason that in answering the questions and submitting myself to an examination as a witness I may incriminate myself and give information as to the details of the said alleged combination and agreement and the names of parties and witnesses which might supply the means of convicting me of a crime and of subjecting me to imprisonment, fines, forfeitures and penalties, and I therefore claim the privilege and immunity of section 10 of the Bill of Rights."

The witness then proceeded to state further objections to the proceeding, invoking certain protections under the Constitution of the United States and attacking not only section 10 of chapter 265, hereinbefore quoted, but the act generally, as being repugnant to certain provisions of the State and Federal Constitutions, which will be noted at

the proper place in the argument on the merits, but which are unnecessary to detail in the opening statement. The Court held that the excuse given by the witness for refusing to answer was insufficient and directed him to answer, whereupon, still declining, he was adjudged guilty of a direct contempt and committed to the county jail of Shawnee County until he should purge himself of such contempt by answering or until the expiration of thirty days. Thereupon an appeal was prosecuted to the Supreme Court of the State of Kansas. Certain errors on the ruling of the Court below were assigned as follows:

I.

The Court erred in not holding that the appellant, under and by virtue of section 10 of the Bill of Rights, was exempt from answering the questions propounded, and from giving testimony with reference to the subject of said inquiry, and the order of the District Court in overruling his claim of immunity was in violation of said section 10 of the Bill of Rights.

II.

The Court erred in not holding that section 10 of chapter 265 of the Laws of 1897, upon which the proceeding was founded, is in violation of that provision of the Fourteenth Amendment to the Constitution of the United States which provides that "No State shall deprive any person of life, liberty or property without due process of law;" said proceeding not being due process of law, in that it was not founded on either complaint, information or indictment. No complaint specifying with reasonable certainty an offense charged to have been committed had been filed, but upon testimony sought to be adduced from appellant, he might have been subjected to penalties and forfeitures provided by other provisions of the act, and also might have been compelled to incriminate himself and give information as to the details of the said alleged combination and agreement and the names of parties and witnesses which might supply the means of convicting appellant of a crime and of subjecting him to imprisonment, fines, forfeitures and penalties; and that said proceeding consequently deprived appellant of his liberty, property, privileges and immunities in a

way other than by due process of the law of the land.

III.

The Court erred in not holding that, for the same reasons set forth in the second Assignment of Error, said proceeding and judgment are further in violation of that provision of the Fourteenth Amendment to the Constitution which provides that "No State shall deny any person within its jurisdiction the equal protection of the laws."

IV.

The Court erred in not holding that chapter 265 of the Laws of 1897 is violative of that provision of the Fourteenth Amendment to the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States," in that it unreasonably restricts, abridges and limits the right and privilege of a citizen engaged in a lawful occupation; and is further violative of that provision of the Fourteenth Amendment which provides that "No State shall deprive any person of life, liberty or property without due process of law," in that it unreasonably limits and restricts the right of private con-

tract and of a citizen to engage in a lawful occupation; and is further violative of that provision of the same amendment which prohibits any State from denying any person within its jurisdiction the equal protection of the laws, in that it unreasonably discriminates between different classes of citizens of the United States, and denies certain citizens the equal protection of the laws.

The case was argued in the Supreme Court of Kansas upon the grounds, among other things, that the immunity afforded was not as broad as the statute. A perusal of that statute will convince the Court that this point ought to have been sustained, for the statute in question affords immunity only from criminal prosecution, and not from the other pains, penalties and forfeitures to be visited upon the party convicted of an offense under it. With the decision of the Supreme Court in this respect, however, we can have no quarrel, because, by interpretation, they have eked out this provision of immunity by their decision hereinafter referred to, so as to cover all pains, penalties and forfeitures included within the terms of the statute. However, we alleged that the coal that we mined was marketed not only within but without the State, and that the testi-

mony we should be forced to give might be used in a criminal prosecution against us under the Sherman anti-trust act, and that we could not plead the immunity of the legislative act to protect us against such prosecution.

We also urged that our rights under the Federal Constitution were invaded by this form of inquisition, summary in its character and in violation of ordinary rules of procedure, for the purpose of extorting testimony upon which prosecution might be based. In both of these contentions the decision of the Supreme Court of Kansas was against us.

Since the ruling in the Smiley case upholds the act generally in so far as it was therein complained against as an unconstitutional exercise of power of the Legislature of Kansas within the terms of the sanctions and guaranties of the Federal Constitution, that element of the controversy is at an end, but we will briefly advert to the remaining questions in the case, which we believe are here for the first time brought to the consideration of this Court.

Argument.

The Court Erred in Denying to the Plaintiff in Error the Protection Claimed Under Section 10 of the Bill of Rights of the Constitution of Kansas, and the Fifth Amendment to the Constitution of the United States.

I.

The Court Erred in Denying to the Plaintiff the Protection Claimed Under Section 10 of the Bill of Rights and the 5th Amendment to the Federal Constitution.

The vital and controlling proposition in this case presents no new principle of law. Whether the origin of the Federal and State constitutional guaranty is to be traced to the common law, or, as some contend, found its genesis in a statute designed to prevent the usurpation of jurisdiction by ecclesiastical tribunals (Statute of Edward II., 1307-1326), all controversialists agree that long before the adoption of the Federal Constitution the principle had become so ingrained in and was so characteristic of the common law as to be coercive upon the courts. It was applied as a simple rule of evidence without either statutory or

constitutional declaration. Liberally translated, this maxim, "*nemo tenetur seipsum accusare*," means that any person, whatever the nature of the action, may refuse to answer any question put to him as a witness, the answer to which will render or tend to render him punishable for a crime, or subject him to a penalty or forfeiture or render him infamous.

Not content with the protection vouchsafed by a rule of evidence derived from the body of the law, it was engrafted into the Constitution of the United States, so that it has become something more than a principle of evidence: it is a constitutional guaranty as well. And this example has been followed by every State of the Union, and in Kansas. As has been said by the Kansas Court, the guarantee is if anything stronger than that contained in the Federal Constitution.

In re Nickell, 47 Kan. 734, 737.

The immunity is not confined to a case in which the individual claiming it is a party, nor is it confined to a criminal prosecution. It may be invoked by any person whose testimony is sought, whether the proceeding be civil or criminal. As said by the Supreme Court of the United States in the now

famous case of *Counselman v. Hitchcock*, 142 U. S. 547, 562:

"It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

Possibly the most frequent illustrations, at least during the earlier applications of the rule, were in proceedings in equity, and it will be observed that the authorities cited in the Counselman case in support of the position of the Court are drawn without discrimination from equity and other civil precedents and criminal prosecutions. This protection likewise extends to proceedings before grand juries, legislative assemblies, committees and investigating tribunals. It is particularly applicable to inquisitorial investigations of an *ex parte* nature where no specific complaint is framed and no definite issue is presented. While it results in conferring a privilege upon the witness, it is something more than this. It is a prohibition

operating directly upon the court or other investigating tribunal or body.

As said by the Supreme Court in Emery's Case, 107 Mass. 184:

"It is to be observed that the provision relates to the privileges of the subject, and not to the authority of any tribunal or body before which an inquisition may be made. It places a limit upon all inquiry to which he may be subjected, not by defining the extent of the authority by which it is made, but by surrounding him with a privilege of exemption, which cannot be set aside by any authority without his own consent."

It is in this respect that the striking difference exists between the continental governments of Europe on the one hand and that of England and the United States upon the other. Here the personal right and security of the individual are of paramount importance. The entire structure of our Government is built upon that idea, and to the fostering and perpetuation of that principle are to be ascribed the growth and development of humanity under those governments.

Dealing, therefore, as this constitutional guaranty does, with a principle of civil liberty, it is to be liberally construed in favor of the individual. As said by the Supreme Court of Missouri in a recent case:

"The courts have jealously enforced it in all cases in which it was properly invoked."

State v. Faulkner, 75 S. W. 116, 135.

And it was declared by Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. 631, who voiced the sentiments of all American courts and lawyers when he said:

"Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

As was justly observed by Justice Gantt in the Missouri case cited (p. 135):

"This principle is not to be abandoned to subserve the exigencies of any particular prosecution. Constitutional safeguards which have resisted the assaults of monarchical power for centuries in England, and withstood momentary clamors in this country throughout our national existence, are not to be frittered away at the demand of those who have apparently studied the fundamental principles of our free institutions to little advantage, when they demand that this universal principle of the common law and this constitutional guaranty of our Federal and all the State Constitutions shall be abrogated because it may prove an inconvenient barrier to the investigation of some flagrant crime or crimes. It was framed by James Madison as it appears in the Federal Constitution, and

no American statesman or lawyer has ever advocated its repeal."

And in applying the touchstone of this constitutional safeguard to any attempted legislative impairment, courts should keep in mind the warning uttered by Justice Bradley in the Boyd case (p. 635):

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It was until very recently undecided in this Court whether the Legislature may by any statutory grant of immunity deprive a witness of his right of absolute silence. See *Walker v. Brown*, 161 U. S. 591. But notwithstanding the decision in that case, it is universally agreed both by State and Federal Courts that the legislative immunity must be as broad and comprehensive as the mischief which would follow the deprivation of the right. See *Counselman v. Hitchcock, ubi supra*, 585,

and the leading case *In re Emery, ubi supra*, p. 185.

The result of all of the cases which sustain the right of the Legislature to pass such statutes is that the only consequence against which the witness need not be protected is the publicity involved in the exposure of his moral delinquencies. The shame and disgrace and the mental suffering following public exposure are the only punishment which can be inflicted upon him by compelling his testimony. And of course this punishment is one meted out at the bar of public opinion and not from the judicial bench. The legal consequences of imprisonment, fine, penalty and forfeiture, and every species of pecuniary or physical reprobation which might follow his conviction of the offense, must be completely withdrawn. This not with respect to a particular crime or misdemeanor, but most inclusively of any crime and all crimes and misdemeanors capable of being defined from the transaction concerning which the witness may testify. In the language of the Court in Emery's case, the exemption must be equivalent to that contained in the Constitution. Except for the mere consequences of publicity, the witness must be put in

no worse position by testifying than if he had remained silent.

It follows as a necessary corollary to these propositions that the statutory claim of immunity must be strictly construed against the State and in favor of the individual. The courts should not indulge in any refinement of reasoning to take away from the individual the mantle which has been cast around him by the constitutional guaranty. Unless the Court can clearly see that the witness is completely protected from legal consequences of his testimony, it must hold that he has a right to maintain silence.

As to the universality of this rule and that it extends even to forfeitures in a court of equity, we direct the Court's attention to the valuable note to *Levy v. Superior Court of the City and County of San Francisco*, 29 L. R. A. 813, *et seq.*

The Witness Should be Protected from Answering, Because His Testimony Might Subject Him to a Criminal Prosecution and to the Forfeitures and Penalties Prescribed by the Federal Anti-Trust Act, as to which the Immunity Granted by Section 10 is Entirely Unavailing.

The foregoing language is extracted from a brief which was presented to the Supreme Court of Kansas in this cause, and the answer to this contention is to be found in the opinion of the Court on page 28 of the record here. We quote from the opinion of the Court. The Court, restating this proposition in the form of an inquiry, goes on to say:

"It is not to be presumed that the examination upon inquiry will go beyond violations of the State anti-trust laws. If such examination be confined to its legitimate scope it will not include but will exclude all acts which would connect it with interstate commerce in violations of the Federal anti-trust law. Under its power to regulate interstate commerce, the United States may legislate upon the subject of private contracts relating to such commerce, and prohibit combinations, pools and trusts so far as they relate to interstate commerce, but has no jurisdiction over combinations, pools and trusts relating to commerce wholly within the State. Nor does the United States acquire jurisdiction over that part of a combination or agreement relating wholly to commerce within a State

by reason of the fact that the combination also covers and regulates commerce which is interstate. In so far as such combinations interfere with interstate commerce, they are under the control of the United States. In so far as they interfere with commerce wholly within the State, such combinations are subject only to the jurisdiction of the State. Where two governments like the United States and a State exercise their authority within the same territory, and over the same citizens, the legislation of that which is to certain subjects is subordinate, should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded."

In support of this proposition the Court cites the case of *Brown v. Walker*, 161 U. S. 591.

The inadequacy and fallaciousness of this answer must be too apparent upon the mere reading of it. Here is not a question of the invading of the jurisdictional powers of one sovereignty by another, but it concerns only the right of the individual guaranteed by the Constitution of the United States, as well as the State of Kansas, and it is that which we shall proceed to discuss in the light of the authorities.

With the terms of the act of July 2, 1890 (26 Statutes at Large 209), this Court is of course entirely familiar. By that act all contracts and combinations in the form of trusts or otherwise, or

conspiracies in restraint of trade or commerce among the several States, are declared illegal, and there are visited upon the offenders punishments through criminal prosecutions in the way of fines and imprisonment, and also certain forfeitures and penalties which the Government may enforce, as well as others which the individual may recover. There is given to the law department of the Government the same right to invoke the equity jurisdiction of the Court to enforce the provisions of the act and restrain violations thereof as is conferred upon the Government of Kansas by the anti-trust act of this State. Indeed, it is asserted and is in a large measure true that the Kansas act is a re-draft of the Sherman anti-trust act.

That the commodity dealt in by these mine operators, being the subject of interstate as well as domestic trade, is within the operation of the Federal statutes, is clear.

See, *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 235.

Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610.

It is furthermore apparent that the exemption from criminal prosecutions conferred by the Kansas statute is confined to prosecutions in the State

courts for violations of the State law. By the very nature of things, the Legislature is powerless to extend it to prosecutions which might be instituted in the Federal tribunals.

No question, therefore, can arise in this case of the respective rights of the witness and of the Court to determine the incriminating character of the proof. The object of the inquiry was declared at the outset. The witness was apprised, both in the application for subpœna and in the subpœna which was served upon him, of the purpose of putting him upon the stand. The questions to which he refused answer were leveled directly at the subject-matter of that inquiry, and if responded to by the witness in favor of the State, they would, if they involved guilt, have unquestionably incriminated him under the Federal law unless he was protected by some grant of indemnity.

It was contended by the attorney-general and held by the Supreme Court that the situation as thus disclosed presented two separate and distinct subjects of inquiry—one pertaining to a violation of the State statute and the other to the violation of a Federal statute. Or, to put it in another form, one pertaining to domestic trade and commerce and the other to interstate. He insisted, and the

Court agreed with him, that there was an independence and lack of relation between these two subjects, and that the immunity of the witness went merely to the ultimate fact in the case and did not extend to those links and chains of circumstance which might lead to the ultimate fact. That this is not the law and that the immunity of the witness is not thus circumscribed has been too many times settled to be matter now for debate.

As said by Chief Justice Marshall on the trial of Aaron Burr (1 Burr's Trial 245):

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it might be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."

See also to the same effect *People ex. rel. v.*

Forbes, 143 New York 219, which contains a most interesting discussion of the law.

This rule was likewise recognized by this Court in *Stevens v. State*, 50 Kan. 712, 717.

A moment's consideration in the application of this elementary rule to the facts of this case is sufficient to refute the position of the attorney-general. These parties were upon trial, so-called, with respect to a commodity of public traffic and sale. Sales and shipments were made of it to persons within the State as well as to those in other States. From the first the mines shipped to points beyond the State, in Nebraska and Missouri. The commodity in its entirety and the dealings of these operators with reference to it must necessarily be kept in view. To say that under such circumstances the witness may be compelled to answer in a case of this character, where he alone knows the facts and circumstances and of which the Judge must himself necessarily be ignorant, would be a practical deprivation of the right. As stated by the Court of Appeals in *Foot v. Buchanan*, 113 Fed. 161:

"If the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question. A question which might appear at

first a very slight and innocent one might, by establishing a link in a chain of evidence, become the means of convicting the witness."

And again, quoting from Chief Justice Marshall in Burr's trial, a remark which has been cited many times with approval by courts, State and Federal:

"When a question is propounded, it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* incriminate himself, then he must be the sole judge what his answer would be. The Court cannot participate with him in this judgment because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privileges which the law allows and which he claims."

See also *People ex rel. v. Forbes*, 143 N. Y. 30.

Dealing, therefore, as this inquiry did, with a subject intimately associated with both domestic and interstate commerce, and where the relation of the one to the other could not in the very nature of things be entered into by an extended explanation of the witness without stripping himself of the privilege which he claimed, it is apparent that he was entitled to be silent.

But more than this, the attorney-general would insist upon the Court going to the full length of committing the witness to a declaration of a combination so far as the domestic output of the coal was concerned. Would not this amount to something more than a link of a chain in the evidence on the subject of violation of the Federal law? How could the witness explain after such admission that the combination did not to an appreciable degree also restrain or affect the interstate dealing in that commodity? Manifestly, he would be in a position where he naturally would have cast a suspicion upon himself in that respect by his own confession. This testimony could be admitted before a Federal grand jury and read against him in a criminal prosecution thereunder as a link or a circumstance in the chain of evidence against him. He would thus become entangled with his admissions of facts and circumstances. It is too clear that he would thus be made to assume the hazard and risk and the jeopardy of prosecution under the Sherman anti-trust act as a result of his testimony in the State court which he would not be under if permitted to remain silent.

The argument of the attorney-general in the Court below, which was adopted by the Court,

was to the effect that the entire scope and purpose of the section of the Bill of Rights which grants immunity was confined to prosecutions under State laws in State tribunals.

It is to say the least significant that in many years during which this principle has been one of familiar application it has never before been thought to be so confined in its operation, and the broad and general words used by the courts in defining the right exclude an interpretation so narrow.

In Emery's case, 107 Mass. 181, speaking of the similar prohibition in the Constitution of that State, the Court said:

"The second forbids that he should be compelled to accuse himself. By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner; although not in the course of any pending prosecution.

But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of

crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision."

See also, *Counselman v. Hitchcock*, 562.

The Supreme Court of Kansas rested its decision upon a dictum in the case of *Brown v. Walker, ubi supra*, and upon a decision of the Supreme Court of Illinois, in the case of *People ex rel. v. Butler Street Foundry & Iron Co.*, 201 Ill. 236; such dictum being the asserted improbability of such a prosecution being instituted. To permit the Court to determine this question for the witness arbitrarily would fritter away the entire protection of the constitutional provision. *Brown v. Walker* involved no such question as that involved here and proceeded upon no such ground. True, it was suggested by the witness in the case of *Brown v. Walker* that the immunity afforded by the Sherman anti-trust act would not protect the witness from prosecution under a State statute. The Court in answering this suggestion quoted the sixth article of the Constitution of the United States and the language of this Court in the case of *Stewart v. Kahn*, 11 Wall. 493, and a number of other cases which uphold the supremacy of acts

of Congress with reference to their subject-matter, the same being within the legislative power of Congress to enact; for example, the Sherman anti-trust act. In effect it was held in *Brown v. Walker* that where immunity absolute and unqualified was afforded to the witness by that statute it precluded the possibility of such immunity being invaded by any prosecution in any State court. But the State of Kansas does not and cannot afford correlatively immunity from prosecution under Federal law.

It is impossible for the Legislature by any grant of amnesty to discharge a witness from an offense committed against the National laws. The distinction is made positively clear by the decisions of *In re Nachmann*, 114 Fed. 995, and cognate cases, wherein it is held that the immunity granted by the bankruptcy act, the same being not as broad as the interstate commerce law, is not sufficient to protect the witness against offenses under the State laws, and therefore the witness is not compellable to testifiy.

See, *In re Nachmann, supra;*

In re Shora, 114 Fed. 207;

In re Smith, 112 Fed. 509;

In re Kanter, 117 Fed. 356.

The exact question was involved in the case of *People v. Nussbaum*, 67 N. Y. S. 492, and while it is not a court of last resort, it is presided over by able judges and its opinions are received with respect throughout the country. In that case there was a grant of amnesty in the act. It admittedly covered all punishments which could be inflicted by the State; but it appeared in that case, as it does here, that the witness would criminate himself under the Federal anti-trust act by testifying. The Court sustained his privilege of immunity for that reason. In the opinion of the Court, by Judge Smith, on page 500, this principle is convincingly argued.

The whole subject is also argued in the case of *United States v. McRae*, 3d Ch. App. Cases, L. R. 79, and we particularly direct the Court's attention to the language of Lord Chelmsford in distinguishing the case before him from the case of the *King of the Two Sicilies v. Willcox*.

A moment's thought will show the disastrous consequences which might ensue from the narrow and restricted application of this constitutional protection contended for by the Court below. For example, a man arrested in Kansas upon a requisition charged with murder in Ohio, and suing out

a writ of *habeas corpus* in the Kansas Courts, could be placed upon the stand and forced to testify to the circumstances of the crime alleged. Many other illustrations occur to the mind. The fallacy involved in assuming that this protection is confined to offenses within the jurisdiction of the Court before which the action is brought lies in assuming that the inhibition rests upon the Court and upon the counsel only in making the inquiry; whereas, in truth and in fact, the purpose of all these statutes and constitutional provisions is to panoply the witness fully and completely against any extraneous coercion to testify at all where his testimony would tend in any respect or in any tribunal to criminate himself.

In respect to the Sherman anti-trust act, moreover, it cannot be said to be a foreign law, or even the law of a foreign jurisdiction. It is as effectual within the jurisdiction of Kansas as it is in any part of the United States. It is the supreme law of the land; all courts are bound to know it and are subject to it.

Manifestly, the Fifth Amendment to the Constitution and section 10 of our Bill of Rights are both intended to accomplish the same result; namely, the immunity of the witness from testify-

ing. If the witness were directly interrogated in the State Court with respect to violation of the Sherman anti-trust act, could it be contended that he could thus be made to implicate himself when, by a mere change of the forum, he would be insured complete protection?

The position of the State would therefore result in this legal anomaly, that the witness might be compelled to forego his election and subject himself to the hazard of a criminal prosecution or a suit to enforce a forfeiture or penalty under the National law by a cunning selection of the time and place at which he should be interrogated in respect to the offense.

It may be contended that the decisions of this Court that the "first eight amendments are limitations only upon the powers of Congress and the Federal Courts, and are not applicable to the several States except so far as the 14th Amendment may have made them applicable," as was stated by the Court in *Brown v. Walker*, precludes the plaintiff in error here from complaining. But we claim and contend that the 14th Amendment to the Constitution of the United States and the guaranties therein contained are applicable to the case at bar. If this witness were to be interrogated by the In-

terstate Commerce Commission with reference to a violation of the Sherman Anti-trust Act, he would have immunity from prosecution for any offense thus revealed and might safely answer. Here, if the rule of the Court is enforced, he may be interrogated touching matters incriminating him under the Sherman anti-trust act and be deprived of his plea of immunity; for it is too clear for argument not only that his disclosure may be used against him, but that he cannot plead immunity because he has not made such disclosure in an inquiry instituted by the Federal Government in relation to such violation. This would be clearly depriving him of a right guaranteed by the Sherman anti-trust act without due process of law. The Interstate Commerce Commission and the Federal courts are as open to the attorney-general of Kansas as to any other citizen of the United States to make any complaint, and when it is disclosed that the subject of this inquiry would involve matters within the exclusive jurisdiction of ~~that~~ those tribunals, he should carry his complaint there, and the witnesses being brought there and interrogated might testify freely and their immunity would be complete against any disclosures they might be compelled to make. But it is idle to say that when the witness claims exemption

upon the ground that his disclosures might render him liable to prosecution under the Sherman anti-trust act, that it is remotely probable that he would be thus prosecuted when the possibility of such prosecution is obvious and imminent; and under the circumstances thus disclosed it is not for the Court to thus determine the question. If he may be prosecuted on account of such disclosures, he has the right to stand mute.

The Denial of the Claim of Immunity Interposed by the Witnesses was in Violation of the Fourteenth Amendment to the Constitution of the United States and Deprived Them of Their Liberty Without Due Process of Law.

Under this head it becomes first important to examine section 10 of the act of 1897 with respect to the machinery created by the Legislature for inquiring into offenses against the act and the working of such machinery. For all practical purposes sought to be attained by this act, the inquiry provided for by this section might as well be committed to a county commissioner. There is no element of judicial power conferred upon the District Judge, unless perchance it be the power of punishing a recalcitrant witness. The county at-

torney, at his own pleasure, sets the machinery in operation, runs it so long as he pleases, and stops when he likes. Neither the District Court nor Judge is clothed with power of pronouncing judgment or passing upon the competency of witnesses, or of restraining or limiting the inquiry in any respect.

From the standpoint of a witness, and particularly one suspected of a violation of the act, the section is remarkable in the absence of all of the fundamental safeguards prescribed by the wisdom of centuries in enforcing punitive laws. No indictment or information may be filed or returned; no complaint of any character specifying an offense committed, and nothing tendering an issue to which the testimony shall be confined, are provided. The witness is called before the Court and subjected to an examination such as the will or caprice of the attorney for the State may suggest, without the benefit of counsel even to interpose proper objections. Without benefit of argument and without knowing the purport of his testimony or the use to which it may be put, he is tied to the stake and subjected to such mental torture as the inquisitor may fancy to inflict.

As demonstrated by the attempt of the attorney-

general and the county attorney in the case below, encouraged in that respect by the District Judge, the inquiry is not even limited to offenses cognizable under the laws of the State, but the witness may be subjected as well to testimony of facts and circumstances forming links in a chain of evidence which would convict him of crime against the National law.

We charge in round terms that this entire procedure, as against one actually or supposedly involved in the commission of an offense under the act, is a denial of the due process of law prescribed by the Fourteenth Amendment to the Constitution of the United States.

It will not suffice to say that no judgment is pronounced upon the conclusion of the hearing. The courts look to the substance of things and not to matters of form, and it is indubitable that as a result of this proceeding an indelible public record will be created for such use as any prosecutor or tribunal, here or elsewhere, may see fit to make of it. Of what protection are the ordinary safeguards of evidence to a defendant subsequently charged with the commission of a crime or against whom a forfeiture is sought to be imposed in a subsequent prosecution when he has in

advance been compelled to take the stand and enlighten the public prosecutor as to all the facts and circumstances relating to his guilt.

We have seen that in the very nature of things, when dealing with a subject covered by both National and State enactments, it is impossible for the witness to testify at all without to a degree incriminating himself under both.

The Supreme Court in effect held that the District Judge had jurisdiction to prosecute the inquiry to the end of extorting from the witness admissions which would serve to convict him of an offense under the Federal statutes, assuming that such consequences of the witness's answer should not be allowed to impede or obstruct a due inquiry into the commission of offenses under the State statute; assuming also thereby that as to the latter character of offenses, the statute itself furnished complete immunity to the particular witness whose testimony was sought to be adduced. Such an assumption, however, it seems clear to us, would involve this inquiry in a legal dilemma. Granted, for the purposes of the argument, that the statute afforded complete immunity from all the punishments prescribed by its terms, and the inquisitor (the county attorney in

this instance) would have a right to make inquiry and to put upon record facts which render the witness liable to punishment under the Federal anti-trust act. To that extent, at least, he would be making an inquiry subsidiary to the enforcement of a penal law of the United States. Either, therefore, the Court has no jurisdiction to do this, or if in furtherance of the purposes of the State statute it assumes the right to do so, it can only be done in pursuance of the laws and constitutional guaranties that protect a witness interrogated by a Federal tribunal with reference to offenses against the United States. In such case, however, such inquisitor would be confronted by the insuperable obstacle of the Fifth Amendment to the Constitution of the United States, which would be clearly applicable as a protection to the witness in giving his answers to inquiries in that event. In either case the *ægis* of the law affords protection to the witness against answering and accords him the protection of silence.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders

judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general laws which govern society."

In *Galpin v. Page*, 18 Wall. 350, the Court said (p. 368):

"It is a rule as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant that until he has been duly cited to appear *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

In *Hovey v. Elliott*, 167 U. S. 416, the Court quotes from the language of Lord Lyndhurst, C. B., in *Capel v. Childs*, 2 Cromp. & Jer. 574:

"A party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defense. On consideration, then, it appears to me, that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment."

And again in the case of *Hovey v. Elliott*, the

Court on page 414, quoted with approval this language in *Windsor v. McVeigh*, 93 U. S. 274:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations."

The Supreme Court of the United States has never determined the bounds of the phrase "due process of law," as found in the 14th Amendment, and has justified its wisdom in that respect, leaving to each case the determination of whether it fell within or without the meaning of the term. There are, however, certain fundamental principles which are to be gathered from the authorities. Among them are that this provision is binding upon and extends in terms to the States and to State tribunals.

See *Hallinger v. Davis*, 146 U. S. 320.

Due process of law is the equivalent to law of the land.

Dun v. Hoboken, L. &c., Co., 18 How. 276.

"The law of the land is that law which secures the individual from the arbitrary exercise of powers of government, unrestrained by established principles of private right and distributive justice."

Bank of Columbia v. Okely, 4 Wheat. 244.

"By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

Trustees Dartmouth College v. Woodward, 4 Wheat. 581.

Ex parte Wall., 107 U. S. 289.

"Due process of law is due course of legal procedure, according to the rules established for the protection of private rights."

Kennard v. Louisiana, 92 U. S. 481, and many other cases which might be cited.

All of which is respectfully submitted.

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No. 54.

In the Supreme Court of the United States.

JOHN D. JACK, *Plaintiff in Error,*
vs.
THE STATE OF KANSAS,
Defendant in Error.

C. C. COLEMAN, *Attorney-general,*
OTIS E. HUNGATE,
County Attorney of Shawnee County, Kansas,
EDWIN A. AUSTIN,
Attorneys for The State.

In the Supreme Court of the United States.

JOHN D. JACK, *Plaintiff in Error,*
vs.
THE STATE OF KANSAS,
Defendant in Error.
} *No.* _____

STATEMENT OF THE CASE.

On September 3, 1903, an application was filed in the office of the clerk of the district court of Shawnee county, Kansas, by C. C. Coleman, the attorney-general of the state of Kansas, and Otis E. Hungate, county attorney of Shawnee county, Kansas, verified by the county attorney, charging that—

"A combination of the persons engaged in operating coal-mines in Osage county, Kansas, and in dealing in the output of said mines in Osage county and other counties throughout the state, exists, the object of which is to fix the price of coal at the mines, and which does in fact fix the price of coal which shall be charged to purchasers at their said mines; that said combination of persons has its regular meeting place in the city of Topeka, Shawnee county, Kansas, and said combination meets, and has met for a year next preceding the filing of this application, on the last Saturday night of each month; that at said meetings so held in the city of Topeka, Shawnee county, Kansas, the members of said combination of coal operators agree upon and fix a minimum price which will be

charged to persons desiring to purchase coal, and further agree that no member of the combination will sell coal any less than the minimum price so fixed at said meeting; that the agreements entered into by said combination are carried out and executed by the members thereof; that said combination and agreements by the members thereof are a violation of section 7864 of the General Statutes of Kansas for 1901; that the following persons have knowledge and information concerning the existence and operation of the aforesaid combination:" [Then follow the names of twenty-eight coal operators and dealers, including the name of plaintiff in error.]

"Your informants respectfully ask that your honor cause to be issued by the clerk subpœnas for the above-named witnesses to appear before said court at such time and place as your honor may fix."

(See pages 7, 8, and 9, printed record herein.)

On this application a subpœna was ordered by the court, and the plaintiff in error was subpœnaed to appear before the district court on a day named therein, "to testify concerning a combination of Osage county, Kansas, coal operators for the purpose of fixing the prices of coal, under chapter 265, Laws of 1897."

(See pages 9 and 10, printed record herein.)

This proceeding was authorized by section 10, chapter 265, Session Laws of Kansas of 1897, which reads as follows:

"SEC. 10. The several district courts of this state, and the judges thereof, shall have jurisdiction, and it shall be their duty, upon good cause shown, and upon the written application of the county attorney or the attorney-general, to cause to be issued by the clerk of said court subpœnas for such witnesses as may be named in the application of a county attorney or the attorney-general, and to cause the same to be served by the sheriff of the county where such subpœna is issued, and such witnesses shall be compelled to appear

before such court or judge at the time and place set forth in the subpœna, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act. And any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law.

"Any person subpœnaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpœnaed shall be taken down by the reporter of said court and shall be transcribed and placed in the hands of the county attorney or the attorney-general, and he shall, in the proper courts, at once prosecute such violation or violations of this act as the testimony so taken shall disclose. Witnesses subpœnaed as provided for in this section shall be compelled to attend from any county in the state."

(Gen. Stat. 1901, § 7873.)

"Afterwards, and on the 7th day of September, 1903, said witness, John D. Jack, appeared in open court in person, and by Rossington, Smith & Histed, J. T. Pringle, and R. B. Gilluly, his counsel, and there appeared also at the same time C. C. Coleman, attorney-general of the state of Kansas, and Otis E. Hungate, county attorney of Shawnee county, Kansas. Thereupon said witness, John D. Jack, filed and presented to the court his motion to quash the subpœna which had been served upon him and to excuse him from being a witness in said investigation or proceeding."

(See page 10, printed record herein.)

This motion was overruled, the witness excepting, and John D. Jack, being called as a witness and sworn, refused to answer certain questions, and stated as the reasons for his refusal the same objections as he had stated in his motion to quash the subpœna.

The examination of the plaintiff in error, the re-

fusal to answer, the reasons for such refusal, objections to the questions and the rulings of the court thereon are here given in full.

Questions by Mr. Hungate, county attorney:

"Q. State your name.
"A. John D. Jack.
"Q. Where do you live?
"A. Burlingame.
"Q. What is your business?
"A. Coal operator.
"Q. Where?
"A. Burlingame.
"Q. What do you mean by coal operator?
"A. Owning a coal-shaft and running coal business.
"Q. Mining coal?
"A. Yes, sir.
"Q. How long have you been in that business?
"A. About fifteen years.
"Q. Have you operated a mine continuously during the last fifteen years?
"A. Pretty much.
"Q. Do you know of any meetings of the operators of Osage county being held in this city at intervals during the last year?
"A. Your honor, I respectfully decline to answer these questions. I claim my constitutional rights, and under them I decline to answer these questions. I decline to answer upon the following grounds:
"I am engaged in operating a coal-mine in Osage county and in dealing in the output in said mines, and am one of the persons named in the application for subpœnas in this proceeding. The product of the mines of Osage county is the subject of both domestic and interstate commerce.
"I respectfully decline to answer the questions or to testify with reference to the subject of this inquiry for the reason that, in answering the questions and in submitting myself to an examination as a witness, I may incriminate myself and give information as to the details of the said alleged combination and agreement and the names of parties and witnesses which might supply the means of convicting me of a crime

and of subjecting me to imprisonment, fines, forfeitures, and penalties, and I therefore claim the privilege and immunity of section 10 of the bill of rights.

"Without in any manner waiving my immunity and privilege, I further object to any proceeding upon this application, for the following reasons:

"*First.* That chapter 265 of the Laws of 1897 is violative of that provision of the fourteenth amendment of the constitution of the United States, which provides that 'no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,' in that it unreasonably restricts and limits the right and privilege of a citizen engaged in a lawful occupation; and it is further violative of that provision of said fourteenth amendment which provides that 'no state shall deprive any person of life, liberty or property without due process of law,' in that it unreasonably limits and restricts the right of private contract and of a citizen to engage in a lawful occupation; and it is further violative of that provision of the same amendment which prohibits any state from denying any person within its jurisdiction the equal protection of the laws, in that it unreasonably discriminates between different classes of citizens of the United States and denies certain citizens the equal protection of the laws.

"*Second.* That section 10 of said chapter 265 of the Laws of 1897, upon which this particular proceeding is founded, is in violation of that provision of the fourteenth amendment to the constitution of the United States which provides that 'no state shall deprive any person of life, liberty or property without due process of law,' said proceeding not being due process of law in that it is not founded on either complaint, information, or indictment, no complaint specifying with reasonable certainty an offense charged to have been committed has been filed, but upon testimony adduced the witness may be subject to penalties and forfeitures provided by other provisions of the act, and that the said proceeding deprives certain citizens and classes of citizens of the United States, including myself, of their liberty, property, privileges and immunities in a way other than by due course of the

law of the land; that the said proceeding is not judicial in its character, and the power attempted to be conferred upon the district judge or court in section 10 is not judicial. For the same reasons, said proceeding is further in violation of that provision of the fourteenth amendment to the constitution of the United States which provides that no state shall deny any person within its jurisdiction the equal protection of the laws.

"*Third*. That said act and said section 10 thereof are in violation of section 1 of the bill of rights.

"*Fourth*. That said act and said section 10 thereof are in violation of section 15 of the bill of rights.

"*Fifth*. That said act is in violation of section 16 of article 2 of this state constitution, which requires that no bill shall contain more than one subject, which shall be clearly expressed in its title."

The court overruled the objections made by the witness, and directed the witness to answer the question.

"Q. I will ask you if you have any knowledge of a combine or an agreement being entered into by operators in coal of Osage county for the purpose of fixing the price of coal sold to residents and citizens of the state of Kansas?

"A. Your honor, I decline, under the same objections, to answer any of these questions.

"Q. Have you any knowledge of any meetings of coal operators of Osage county, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?

"A. Your honor, I still decline to answer these questions, under the same objections.

"Q. Do you know of any agreement having been entered into within this county within the last year between the operators in coal who operate in Osage county, Kansas, by which they attempted to fix and settle the price of coal between themselves and citizens of Kansas?

"A. Your honor, I still decline, under the same objections.

"The court: As I understand, you decline to answer each of these questions?

"The witness: Yes, sir.

"The court: The court finds that the excuse given for declining to answer is insufficient.

"The court thereupon instructed and directed the witness to answer the questions propounded to him, but the witness still refused to answer the questions or any one of them, except as above indicated; whereupon the court made the following finding and order, to wit:

"The court finds you guilty of a direct contempt of court in refusing to answer the questions, and the order of the court is that you be committed to the jail of Shawnee county until you shall answer these questions, but not beyond a period of thirty days."

The witness excepted to the ruling, finding and order of the court.

(See pages 12, 13, and 14, printed record.)

Section 10 of the bill of rights of the constitution of Kansas, referred to by the witness, reads:

"No person shall be compelled to testify against himself." (Constitution of Kansas, Bill of Rights, §10, Gen. Stat. 1901.)

The formal order being entered on the journal of the court in accordance with these proceedings, the witness appealed from the judgment to the supreme court, where, after argument and consideration, the judgment of the district court was affirmed.

(See page 20, printed record herein.)

The syllabus and opinion of the supreme court appear in the record here.

(See pages 20 to 31, inclusive, printed record herein.)

It is printed below as a part of this brief.

The case now comes to this court on writ of error to the supreme court of the state, and the assignment of error, though elaborated into eight propositions and assignments, may be as well, though more concisely, stated as claiming the statute to be in violation of the fourteenth amendment to the constitution of the United States.

ARGUMENT.

The constitutionality of the act of the state of Kansas in its general effect, so far as involved in the writ of error of a person convicted of a violation thereof, has been sustained by this court.

Smiley v. Kansas, 196 U. S. 447.
National Oil Co. v. Texas, 197 id. 115.

The scope and meaning of this act of the legislature and of the clause in the constitution of the state of Kansas in question, as determined by the supreme court of the state, conclude this court in determining whether or not such statute and constitution violate the federal constitution.

Smiley v. Kansas, 196 U. S. 447.

"It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a statute by that court. (St. L. I. M. & St. P. Rly. Co. v. Paul, 173 U. S. 404, 408; M. K. & T. Rly. Co. v. McCann, 174 id. 580, 586; Fuller v. L. E. & W. R. R. Co., 175 id. 348.) Nor is it material that the state court ascertains the meaning and scope of the statute, as well as the validity, by pursuing a different rule of construction from what we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in United States v. Reese,

92 U. S. 214; Trade-mark Cases, 100 id. 82; United States v. Harris, 106 id. 629, and Baldwin v. Franks, 120 id. 678. We shall not stop to consider that question, nor the reconciliation of the supposed conflicting views suggested by the chief justice of the state. The power to determine the meaning of a statute carries with it the power to prescribe the extent and limitations as well as the method by which they shall be determined."

In the argument below, it was claimed that the consequences of sections 5 and 7 of the act in question were equivalent to outlawry and banishment. The supreme court of the state especially answers this contention:

"There is a further provision of section 5 that every person, company or corporation violating any of the provisions of the act within the state are denied the right and are prohibited from doing any business within the state. This latter provision contemplates prohibiting only the continuing of business or the engaging in business in the state in violation of the act. It is not intended thereby to prohibit persons continuing or engaging in any lawful business in the state not conducted or carried on in violation of the act. Viewed in the light of the interpretation thus given it, the provision is a valid exercise of legislative powers, and is not open to the charge against it by appellant that it constitutes in effect banishment from the state. The provision of section 7, that in any civil action there may be pleaded in defense that the plaintiff or any person interested in the prosecution has within one year been guilty of a violation of any of the provisions of this act, as held in Barton v. Mulvane, 59 Kan. 313, under a similar provision of the anti-trust act of 1889, contemplates only civil actions relating to and growing out of transactions prohibited by the act. It is not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property rights and interests not connected with such combinations and trusts. Thus interpreted, the provision is a valid

exercise of legislative power and is not open to the charge of appellant that it constitutes outlawry."

Thus is the general language, which construed and interpreted by other rules and methods of interpretation might be considered as objectionable, relieved of all ground of criticism. Indeed, it is admitted in the brief here that all possible prosecutions, penalties and forfeitures under the state law are included in the immunity as interpreted by the supreme court. (Plaintiff in error's brief, p. 10.)

In the court below, the immunity of section 10 of the act was claimed not to be broad enough, in that it afforded no immunity to a stockholder in a corporation violating the provisions of the act and subject to forfeiture of charter, rights and franchises under section 4 of the act.

As to this point the court says:

"There is nothing in the record disclosing appellant to be a stockholder, an officer or agent, or otherwise connected with any corporation that may in any manner be affected or suffer as the result of his disclosure as a witness. The constitutional provision was intended for the protection of the witness. The hurt must be his own. He must himself be included in the terms of the law before he has just grounds for complaint."

Citing The State v. Smiley, 65 Kan. 240, from which this court quotes approvingly the paragraph covering this point in its opinion in the same case when before this court.

Smiley v. Kansas, 196 U. S. 457.

Therefore, what the court says concerning the proper meaning of section 4 and the extent of the immunity when the question should be squarely pre-

sented, though it could be reasoned as not presenting any conflict with federal constitution, need not be considered because it is not within the limits of plaintiff in error's right to complain.

It was contended below that the proceeding upon application before the district court, as provided in section 10, was not judicial in its character or nature, and therefore is not due process of law.

The court below held that it was a valid exercise of judicial power and the procedure to be due process of law.

This court is, of course, the tribunal of final determination of whether a state statute violates the federal constitution, and whether procedure under it constitutes due process of law, but where a state court holds that one of its statutes provides only for a preliminary proceeding, resulting in no final judgment except against recalcitrant witnesses in contempt, who are entitled to the rights of litigants and parties as in a judicial hearing and determination, this, in a measure, comes within the rule first quoted from Smiley v. Kansas, 196 U. S. 447, a conclusive interpretation of a state statute, especially where it holds that the examination provided for by the statute is to be confined to and not go beyond violations of the state anti-trust law.

However, the question whether such procedure, including whether trial without a jury in contempt proceedings, constitutes due process of law from the standpoint of the federal constitution, is no longer an open one in this court.

Interstate Commerce Com. v. Brimson, 154 U. S. 447.

As the supreme court of Kansas in this case said:

"In the case of Interstate Commerce Com. v. Brimson, 154 U. S. 447, the court upheld a somewhat analogous provision of the interstate-commerce act wherein the circuit court is given power to entertain an application of the commission, issue subpœnas, examine and commit for contempt in cases where the witness refuses to testify. The procedure under said section 10 is an investigation, or preliminary proceeding, and can result in no final judgment, aside from a proceeding in contempt against a recalcitrant witness, except as the consequences of a regular judicial trial conducted in the manner provided by statute."

The only possible question that is not clearly foreclosed by previous decisions of this court is:

Does the Fourteenth Amendment of the Federal Constitution so Limit The State that a Witness Examined under this Law is Justified in Refusing to Answer Because the Immunity Afforded by Section 10 of the Act in Question does not Protect Him Against Criminal Prosecutions, Fines and Forfeitures for Violations of the Federal Anti-Trust Law?

The plaintiff in error, in his motion to quash the subpœna and in his objection to answering the questions put to him, volunteered a statement of fact wholly irrelevant to the inquiry proposed by the proceedings, subpœna, and questions, for the purpose of founding upon it a portion of his objections.

"The product of the mines of Osage county, Kansas, are the subject of both domestic and interstate commerce."

(Printed record, pp. 10 and 12.)

But the court in this case practically held that this

statement did not broaden the field of inquiry open to the state prosecuting officers. It says:

"It is not to be presumed that the examination upon inquiry will go beyond violations of the state anti-trust law. If such examination be confined to its legitimate scope it will not include, but will exclude, all acts which would connect it with interstate commerce in violation of the federal anti-trust law."

(See opinion in printed record.)

The federal law and chapter 265 of the Laws of 1897 of Kansas inhibit entirely separate and distinct transactions.

A violation of the state law would not be an offense against the Sherman anti-trust law. An investigation of violations of the state law would authorize no question to be put to the witnesses relating to interstate commerce. The questions put in this case do not in any manner relate to or tend to extort answers which would tend in any manner to incriminate the witness under the Sherman law.

The witness cannot by his voluntary statement, wholly irrelevant to the investigation being conducted, stay the hand of the state court or render invalid the commitment for refusing to answer questions concerning the violation of this act by combinations affecting domestic commerce only.

The provision for judicial oversight and control of the inquiry is the plaintiff in error's guaranty of due process of law and of his escape from the very dilemma postulated by his assignments of error. Timely objection would restrain the inquisitor from making the inquiry other than it is designed to be an investigation of violations of the state law, and would re-

strain it from becoming subvenient or subsidiary to a federal prosecution. So restrained, the danger he fears becomes "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct"; such a danger as this court, speaking in regard to this very question—"the possibility that by his disclosure a witness might be subjected to the criminal laws of some other sovereignty"—say that it was never the object of this provision to obviate.

Brown v. Walker, 161 U. S. 591–608.

However, it may be suggested that though the questions are, as the questions actually put in the case were, limited solely to the combination to control the price of the Kansas product in Kansas, yet written contracts relating to such combination might cover other transactions interstate in their character, and a production of them in the investigation of the state inquiry would expose them to federal prosecution.

It is apparent from the scope of the inquiry as allowed by the decision of the supreme court of the state in this case, that the only disclosure of violations of the federal anti-trust law which might be compelled in the proceedings at bar would be where disclosures of violations of the state law incidentally and unavoidably disclosed also the federal offense.

No direct decision or analogous case in the courts of this country can be cited where it was held that the witness would be protected from answer in such a contingency.

In the court below the case of People v. Nusbaum, 67 N. Y. Supp. 492, was cited. That was not a case where the privilege of a witness was involved, being an appeal to an appellate division of an inferior court of New York from an order appointing a referee and directing a witness to appear before the referee. The opinion of the court held that the application for the order was insufficient. One judge in separate opinion, not concurred in by the other judges, suggested that if the contract be obnoxious to the New York statute it came equally within the condemnation of the federal statute, and to require the witness to answer questions concerning it would be an infringement of the constitutional exemption. The opinion does not specify the constitution the judge referred to, but presumably he referred to the constitution of the state of New York. Two other judges write opinions in the case, but neither refers to this proposition.

The cases cited by counsel for plaintiff in error on page 30 of his brief (*In re* Nachman, 114 Fed. 995; *In re* Shora, 114 id. 207; *In re* Smith 112 id. 309; *In re* Kanter, 117 id. 356) arose under the bankruptcy law of Congress, which contains the clause condemned in Counselman v. Hitchcock, 142 U.S. 547, and are decided upon the authority of that case. None of them contain any discussion of the question now before this court.

The decision in this case by the state supreme court is conclusive that the constitutional exemption found in section 10 of bill of rights of the constitution of the state of Kansas does not protect the witness from answering the questions put to him or any

other questions within the proper scope of inquiry—that is, as to violations of the state law. Therefore the question here involves the validity of the Kansas constitution as thus construed as well as the validity of the statute.

It is the settled doctrine of this court that the provisions of the fifth amendment, which contains the provision against compelling a witness in any criminal case to testify against himself, are limitations only upon federal action, and do not apply to prosecutions or proceedings in state court.

Thorington v. Montgomery, 147 U. S. 490.

The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other or of both governments to the people.

In re Kemmler, 136 U. S. 436.

The fourteenth amendment did not add to the privileges and immunities of citizens of the several states, and it did not so enlarge the effect of the former amendments that they now apply to the states and the citizens thereof. The contention that by the fourteenth amendment the provisions of the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of federal power, are to be regarded as privileges and immunities of a citizen of the United States, was elaborately met, and the cases decided since the adoption of that amendment reviewed, in Maxwell v. Dow, 176 U. S. 581. The court held that the right of the defendant to a common-law jury was a right which rested with the state governments and

was not protected by the amendment under discussion.

Hurtado v. California, 110 U. S. 516, held that proceeding by information instead of by indictment of a grand jury was due process of law, and that the fifth amendment had no application. This decision could not have been arrived at if a citizen of the United States were entitled by the fourteenth amendment to claim that he could not be proceeded against in a state court except in accordance with the provisions of the fifth amendment.

It is true that the opinion in Maxwell v. Dow, 176 U. S. 581, limited its decision to one point, that the privileges and immunity clause of the fourteenth amendment did not make the sixth amendment applicable to proceedings in a state court. But the reasoning is persuasive that the general proposition is true that the fourteenth amendment in none of its clauses so enlarged the effect of the first ten amendments, originally designed and held to be restraints upon federal action and not applicable to or in restraint of the states, as to make any of the provisions of the same a restraint upon state procedure.

It is noteworthy that in framing the fourteenth amendment Congress adopted and extended, as a restraint upon the states, certain language of the fifth amendment and did not so adopt the remainder of it.

The clause immediately following the provision, "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of

the United States," is phrased in almost the exact language of the fifth amendment. It reads:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law."

The fifth amendment reads:

"No person shall, etc., . . . nor be deprived of life, liberty, or property, without due process of law."

If any of the preceding or succeeding clauses of the fourteenth amendment made the fifth applicable to the states, why was this language only repeated?

This language stands, undoubtedly, as an original limitation on the states in its own proper vigor, which gains no strength and suffers no weakness because it was first used in the fifth amendment in relation to federal action.

But it is significant that this much of the fifth amendment was taken to become a limitation on the states, and the remainder of that amendment was left as a restraint upon the federal government only.

The exclusion becomes significant by the selection of the part.

There is a companion clause of the fifth amendment immediately preceding the clause under consideration:

"Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb."

The supreme court of the United States, more than fifty years ago, laid down the doctrine that the same act might, as to its character, tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might

draw to its commission the penalties denounced by either as appropriate to its character in reference to each, and have never departed from that doctrine.

Fox v. Ohio, 5 How. 410.

United States v. Marigold, 9 id. 560.

Moore v. Illinois, 14 id. 13.

Since the adoption of the fourteenth amendment, in *Ex parte* Siebold, 100 U. S. 371, they say:

"Each government punishes for a violation of duty to itself only. Where a person owes a duty to two sovereigns he is answerable to both for its performance and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act need not be decided, although considerable discussion bearing on the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained."

In Dreyer v. Illinois, 187 U. S. 75, 85, 86, they intimate pretty clearly that the fourteenth amendment does not embrace the guaranty that no person shall be put twice in jeopardy of life or limb, though they do not directly decide it.

If the fourteenth amendment was intended to extend the provisions of the clause against involuntary disclosures as a restraint upon the states, it would be reasonable to suppose that it was intended to extend the clause against being put twice in jeopardy as a like restraint.

There is greater reason, in the interest of and for the preservation of the liberty of citizens, that they be protected from a second prosecution under the state law than that they be protected against involuntary disclosures.

A successful prosecution under the federal law would develop the facts so that a conviction for a second time for the same transaction, so far as it involved a state offense, would be a foregone conclusion when prosecuted therefor in a state court, and if the federal prosecution was unsuccessful, the state prosecution would be informed in advance of the obstacles that caused that failure and enabled to avoid them. Whereas, if compelled in the state court to testify to facts necessary for the purposes of that jurisdiction, and for which he is pardoned in advance before the disclosure could be compelled, the facts which might subject him to punishment in the other jurisdiction would only be disclosed incidentally, and because they were so closely connected that he could not disclose the one without the others; but he also has the chance that the disclosures could be so restrained that they would be insufficient for the exigencies of a criminal prosecution in the other jurisdiction, and the further chance that the prosecuting officer of that jurisdiction might never institute any proceedings against him where he had already been prosecuted or punished for the same transaction in the state court.

It is a reasonable position that these two clauses of the fifth amendment are so correlated, standing in close juxtaposition, that the fourteenth amendment cannot be held to draw one as a restraint upon the states without drawing the other, and that the generally accepted construction in relation to the companion clause (against being put twice in jeopardy for the same offense) is indicative of the proper con-

struction in relation to the clause, no person shall be compelled to be a witness against himself.

This proposition is sustained by the reasoning in the opinion in Hurtado v. California, 110 U. S. 516:

"We are to construe this phrase in the fourteenth amendment by the *usus loquendi* of the constitution itself. The same words are contained in the fifth amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"'No person shall be held to answer for a capital, or other infamous crime, unless on a presentment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself.'

"It then immediately adds:

"'Nor be deprived of life, liberty, or property, without due process of law.'

"According to a recognized canon of interpretation especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this important amendment is superfluous. The natural and obvious inference is, in the sense of the constitution 'due process of law' was not meant or intended to include, *ex vi termini*, the institution of a grand jury in any case.

"The conclusion is equally irresistible, than when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if by the adoption of that amendment it had been part of its purpose to perpetuate the institution of a grand jury in all the states it would have embodied, as did the fifth amendment, express declarations to that effect."

Quoted with approval in Hallinger v. Davis, 146 U. S. 314.

In West v. Louisiana, 194 U. S. 258, the question was whether "due process of law" in the fourteenth amendment included the principle of that clause of the sixth amendment requiring the accused in criminal prosecutions to be confronted by the witnesses, and Mr. Justice PECKHAM said:

"As to the federal constitution, it will be observed that there is no specific provision therein which makes it necessary in a state court that the defendant should be confronted with the witnesses against him in criminal trials. The sixth amendment does not apply to proceedings in state courts. Spies v. Illinois, 123 U. S. 131; Brown v. New Jersey, 175 id. 172; Maxwell v. Dow, 176 id. 581. The only question, therefore, is, as we have stated, whether the reading of the deposition under the circumstances amounted to a violation by the state of the fourteenth amendment by depriving the plaintiffs in error of their liberty without due process of law. . . . The state of Louisiana had the right to change the common law at any time, although it had theretofore adopted it with certain limitations. If, through its courts, it erred in deciding what the common law was, yet if no fundamental and absolutely all-important rights were thereby denied to an accused, he still had due process of law, and could not complain to this court regarding the error, assuming, of course, that the decision did not conflict with some *specific* provision of the federal constitution. . . .

"The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the federal constitution. Brown v. New Jersey, 175 U. S. 172. Coming to a decision of the question before us, we are of the opinion that no federal right of the plaintiff in error was violated by admitting this deposition in evidence. . . .

"We say this with reference to the question whether the admission of the deposition fails to give the accused 'due process of law,' as provided for in the fourteenth amendment.

"As the sixth amendment does not apply to state courts, the question as to what is required under its provisions in order to preserve the right to be confronted with the witness is eliminated from any inquiry by this court in this case."

And then said that in Hurtado v. California, Maxwell v. Dow and Brown v. New Jersey it was held that the several rights mentioned in them were not those fundamental rights which are protected by the federal constitution, when presented for review under state constitutions.

And, therefore, we contend that if by the adoption of the fourteenth amendment it had been part of its purpose to perpetuate the clause "nor shall he be compelled in any criminal case to be a witness against himself" in all the states it would have embodied, as did the fifth amendment, express declarations to that effect.

Indeed, Mr. Justice HARLAN, in his dissenting opinion in that case, argued in effect that inexorable logic would require it be, likewise, held that the right not to be put twice in jeopardy of life and limb, not compelled in a criminal case to testify against one's self (rights and immunities also specifically recognized in the fifth amendment), were not protected by the fourteenth amendment, there being no express declaration in it to that effect.

But the question here does not go so far. The state had not abolished the privilege against self-incrimination. That constitutional provision still exists unim-

paired. Its effect has not been restricted from that required by the settled usages and precedents existing under the common law and statutes of England at the settlement of this country.

The complaint is, that to it a broader meaning and a more extended immunity should now be given than was required by the common law. If by the common law the rule that no man should be compelled to incriminate himself was one which, existing merely by virtue of municipal law of England, must have reference exclusively to matters penal under that law, as was held in King of the Two Sicilies v. Willcox, 1 Sim. N. S. 301, then such constitutional clause in the several state constitutions, by parity of reason, must be construed to have reference only to matters penal under the laws of the state. If, then, prior to the fourteenth amendment, there was no provision of the federal constitution which required it to have reference to the laws of the United States and to matters made penal under such laws, it must still be construed, notwithstanding the formation of that government under the constitution, to have reference to matters penal under the laws of the state.

If, then, prior to the adoption of the fourteenth amendment the state had granted a full immunity from all prosecution, penalties, fines and forfeitures for all violations of the state laws about which a witness may testify, as it had in this case, no one, we think, will contend that a subsequent imprisonment for refusal to testify about matters included in that immunity was a deprivation of liberty without due process of law.

But the claim must be, we take it, that what was due process of law by the common law, and what was due process of law before the adoption of the fourteenth amendment, has become now, by the force of that amendment, "without due process of law."

It is true that in Railroad Commission cases (Stone v. Farmers' Loan and Trust Co., 116 U. S. 307; Dow v. Biedleman, 125 id. 680; Georgia Railroad and Banking Co. v. Smith, 128 id. 174; C. M. & St. P. Rly. Co. v. Minnesota, 134 id. 418; C. & G. T. Rly. Co. v. Wellman, 143 id. 339; Budd v. New York, 143 id. 517; Reagan v. Farmers' Loan and Trust Co., 154 id. 362; St. Louis & San Francisco Rly. Co. v. Gill, 156 id. 649; Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 id. 226; Smith v. Ames, 179 id. 466; Norwood v. Baker, 172 id. 269; Choctaw, O. & G. Rld. Co. v. Tennessee, 191 id. 326, and other cases), the principle, at least, of the last clause of the fifth amendment, "nor shall private property be taken for public use without just compensation," has been applied as a restraint upon the states, although there is no separate express declaration to that effect.

The doctrine of these cases, however, though reprehending the acts under consideration as amounting to "a taking of private property for public use without just compensation," in the language of the fifth amendment, is not so much that the phrase "due process of law," in the fourteenth amendment, has any more extended meaning than it had in the fifth amendment, or that it carried the last clause of that amendment without any express clause to that effect

as a restraint upon the states, as that the language of the fourteenth amendment, though used with reference to the law of the states, in the same sense and with no greater extent than it had been used with reference to the laws of Congress in the fifth amendment, includes *proprio vigore* that special deprivation of property separately covered by the last clause of the fifth amendment. To take one's property for public use without just compensation would be to deprive him of it without due process of law.

It may be claimed that the language of the fifth amendment, "in *any* criminal case," extended the privilege of silence in federal courts against self-incrimination of violations of the laws of all other governments, and that the fourteenth amendment, by the mere phrase, "due process of law," extended a like restraint against the states, but we believe that this court will follow the argument of this brief that such was not the effect of the privilege of silence at the common law; that the fifth amendment by this clause refers to criminal cases under the laws of Congress, as stated in Hurtado v. California, that the fifth amendment was not made applicable to the states by the fourteenth amendment further than the language of it was expressly adopted by it, and that in the language of the fourteenth amendment *proprio vigore* must be found the restraint on the states, or not at all.

In view of the cases already commented upon, it will be superfluous to refer to the many other cases where, for the purposes of those cases, this court has attempted general definitions of due process of law.

Den v. Hoboken Land etc. Co., 18 How. 280.

Bank of Columbia v. Okeley, 4 Wheat. 244.
Kennard v. Louisiana, 92 U. S. 481.
Pennoyer v. Neff, 95 id. 733.
Davidson v. New Orleans, 96 id. 104.
Kilbourn v. Thompson, 103 id. 182.
Hagar v. Reclamation Dist., 111 id. 708.
Leeper v. Texas, 139 id. 468.

These cases, though somewhat illuminating, do not greatly advance the argument farther than it has been.

To find any federal constitutional restraint of the states in this case, the court must say that imprisonment by a state court of a recalcitrant witness who refuses to testify, though granted full immunity from prosecution by that jurisdiction, because his disclosures might subject him to the possibility of prosecution under some federal law, constitutes a deprivation of liberty without due process of law, using that term only in its own proper vigor and meaning. So there is no question involving the language of the fifth amendment not taken and not used in the fourteenth amendment. If it had been the purpose to perpetuate the clause against self-incrimination, it would have embodied an express declaration to that effect.

Quoting further from Hurtado v. California:

"Due process of law in the latter (the fifth amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the constitution of the United States exercised within the limits therein prescribed and interpreted according to the principles of the common law. In the fourteenth amendment, by a parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits

of those fundamental principles of liberty and justice which lie as the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure. 'The fourteenth amendment,' as was said by Mr. Justice BRADLEY, in Missouri v. Lewis, 101 U. S. 22, 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right to trial by jury, and on the other side no such right. Each state prescribes its own mode of judicial proceeding.'

. . . . . .

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

In Brown v. New Jersey, 175 U. S. 172, this court said:

"The state is not tied down by any provision of the federal constitution to the practice and procedure which existed at common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

Undoubtedly the authority to determine what crimes are punishable and to provide for their punishment is a part of the general police power of a sovereign and independent state, and, not being conferred by the constitution of the United States upon the federal government, remains with the separate states of the Union. The fourteenth amendment does not create, narrow or widen police power, but leaves it as it was before that amendment was adopted.

In re Rahrer, 140 U. S. 554.

In Munn v. Illinois, 94 U. S. 113–134, the chief justice, delivering the opinion of the court, said:

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process of law, but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law, as they are developed, and to adapt it to the changes of time and circumstances."

While this court has said that it will not attempt to define what it is for a state to deprive any person of life, liberty or property without due process of law in terms that would cover every exercise of power thus forbidden to the state, and exclude those which are not (French v. Barber Asphalt Paving Co., 181 U. S. 329), it has, in a measure, pointed out the field of that clause, "due process of law," in its essential elements.

"The essential elements of due process of law are notice and an opportunity to defend."

Simon v. Craft, 182 U. S. 436.

To this ought to be added, with respect to property, that private property be not taken without just compensation.

In the illustration suggested by counsel for plaintiff in error, on pages 31 and 32 of his brief, of an arrest here under a requisition for murder in Ohio and a *habeas corpus* in our courts, the respondent, even if a Kansas officer, would be a representative of the state

of Ohio and it would be very proper to apply the same rule the state of Kansas would be subject to under similar circumstances, or that the state of Ohio would be subject to in its own courts under similar circumstances. But in this case the state of Kansas, not another sovereignty, is proceeding against a witness which it has fully pardoned, in advance, of any penalty or forfeiture under its own laws, and the question is, whether the bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, such witness may still refuse to answer.

The state of Kansas has not attempted any new departure in its practice or procedure. Its device for obtaining evidence of violations of its laws is one it found sanctioned by the laws of other states and by the United States; a device which has been sustained by this court.

Brown v. Walker, 161 U. S. 591–608.

In that case an analogous contention was made to the claim made in this case, that the immunity granted by the act of Congress under consideration was not broad enough, because it did not guarantee the witness immunity from prosecution in the state courts.

One answer to that claim was:

"There was no such restriction, however, upon the application of federal statutes. The sixth article of the constitution declares, 'This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary not-

withstanding.' The language of this article is so direct and explicit that but few cases have arisen where this court has been called upon to interpret it, or determine its applicability to state courts. . . . The act in question contains no suggestion that it is to be applied only to the federal courts. . . . It is not that he shall not be prosecuted for or on account of any crime concerning which he may testify, which might possibly be urged to apply to crimes under the federal law, and not crimes such as the passing of counterfeit money, etc., which are also cognizable under state laws, but the immunity extends to any transaction, matter or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable wherever and in whatever court such prosecution may be had."

This answer will be relied upon as the basis for an argument that inasmuch as this court thought it necessary to invoke the doctrine of "the supreme law of the land," in order to sustain an act of Congress granting immunity from prosecution, and inasmuch as no act of any state can operate against federal prosecutions—not being like an act of Congress, "the supreme law of the land"—there must be some potency given to the fourteenth amendment, as containing a restriction on the states, restricting them from compelling disclosures under statutes granting immunity from state prosecution, which would still be self-criminatory as far as federal prosecutions were concerned.

The criticism of Mr. Justice Shiras, that the cases cited to sustain the answer to the contention in the Brown v. Walker case, quoted above, arose under an act of congress justified only as an exercise of the war power, might be answered thus: that the war power justified the act, but the sixth article gave it its gen-

eral effect as the supreme law of the land, when adopted. But we submit that it was in that case unnecessary to invoke the supremacy of the act of Congress; that the succeeding language of the majority opinion states a complete and more logical answer to the contention, and one that applies equally as well to the act of the state of Kansas—an answer quoted and approved by the supreme court of Illinois in People v. Butler Street Foundry Co., 201 Ill. 236, and by the supreme court of Kansas in this case.

"But even granting that there was still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice COCKBURN said in Regina v. Boyes, 1 Best & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the house of commons, is not a real and probable danger with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate"

This language is sustained by the decision in King of Two Sicilies v. Willcox, 1 Sim. N. S 301, that the rule of the common law of England had reference only to matters penal by that law, and a discovery could not be refused because the disclosure would subject the witness to criminal prosecution by some other sovereignty.

The supreme court of Illinois, citing Brown v. Walker, has held that the possibility that an affidavit required by the anti-trust law of that state might

contain disclosures tending to show a violation of the anti-trust law of some other state or of the United States was not a real and probable danger of criminal prosecution, within the constitutional privilege against giving self-incriminating evidence.

People v. Butler Street Foundry, 201 Ill. 236.

The supreme court of Kansas in this case (printed record, p. 31) follows those cases, and holds that—

"The possibility that his answers to the inquiries might disclose violations of the federal anti-trust law, and the evidence thus given be used against him in a criminal prosecution for a violation of that law, was not a real and probable danger of criminal prosecution, within the constitutional privilege that no person shall be a witness against himself."

We would perhaps be disingenuous if we did not refer to the case of United States v. Rea, Ch. App. Cas. L. R. 79, in which the prior case of King of the Two Sicilies v. Willcox, 1 Sim. N. S. 301, was distinguished. In this latter case, the United States, as complainant in a bill in equity, sought a discovery of moneys received by the defendant as agent of the Southern Confederacy. The defendant plead the pendency of another case in the United States courts in this country, wherein the United States was seeking a forfeiture of his individual property in the United States, on the ground that, in violation of a federal statute, which he set out, he had acted as agent and had aided and abetted a rebellion against the United States, and that he could not state any of the circumstances connected with his agency without his answer having a tendency to expose him to forfeiture.

The court held that it would not be unjust to ex-

tend the privilege of silence to that case, where the party who had invoked the jurisdiction of the courts of England and who was seeking the discovery had the power to proceed in its own courts, and was in fact proceeding to enforce the forfeiture, and the subject of the forfeiture (lands owned by the defendant in Georgia) was within the United States, and the proceedings against the defendant's property would be effectual, whether the defendant remained in England or returned to the United States, and the answer of the defendant would furnish the means of making it effectual.

While the broad doctrine of the former case was not applied in that case, it was approved in principle, and the reason for the ruling made seems to be justified by the general principles of equity apart from that doctrine.

With respect to this very question, Mr. Justice BROWN, speaking for the majority, said, in Brown v. Walker, 161 U. S. 606:

"It is true that the constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the power of Congress and the federal courts, and are not applicable to the several states except so far as the fourteenth amendment may have made them applicable."

And Mr. Justice SHIRAS, in his dissenting opinion, concurred in by Mr. Justice GRAY and Mr. Justice WHITE, said: "The provisions of the constitution of the United States which protect witnesses from self-incrimination cannot be invoked in a state court."

If the fourteenth amendment has made this provi-

sion applicable as a restraint upon the states, then the tenth amendment, which provides, "The powers not delegated to the United States by the constitution nor prohibited to the states are reserved to the states respectively or to the people," must now be taken with allowance.

If the full pardon by the state is to be held to be ineffectual because it does not extend to federal offenses, then the state is limited in its power to legislate concerning its domestic affairs.

Because, it must be conceded, the states cannot affect federal powers or federal offenses. No immunity in a state statute can be made broad enough to include immunity from federal prosecutions.

In such a case the language of Chief Justice MARSHALL is more than usually appropriate:

"It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Fletcher v. Peck, 6 Cranch, 128.

It is true that in ascertaining the meaning of any phrase in the constitution or its amendments it must be construed with reference to the common law, from which it is taken.

United States v. Wong Kim Ark, 169 U. S. 649.

And it is true, as was held with respect to protection from second jeopardy for the same offense, in Kepner v. United States 195 U. S. 126, protection was accorded at the common law, a witness being compelled

to testify against himself, noting, however, that at common law it was applied as a simple rule of evidence, as counsel for plaintiff in error admits on page 12 of his brief.

But the common law, constitutions and statutes must all be considered in the light that they have no extraterritorial force; that they were not intended to operate in other sovereignties, and that they have reference only to matters within their own jurisdiction. And when so considered it will be seen that the Kansas constitutional privilege of silence is a privilege of silence concerning matters penal by its own laws, and that immunity from penalty which justifies compulsory disclosures is immunity in the matters penal by its laws; that neither the constitution nor the statute includes a privilege concerning matters penal only by the laws of some other sovereignty, such as another state or the United States.

While in the early case of Fletcher v. Peck, 6 Cranch, 136, this court said that the state cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution, yet, it is said in Railroad Co. v. Peniston, 18 Wall. 31, that the federal constitution must receive a practical construction, and that its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states or prevent their efficient exercise.

While an act of Congress within its field is "the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution

or laws of any state to the contrary notwithstanding," yet an act of Congress not in pursuance of the constitution would not be such supreme law of the land, and an act of Congress which, under the guise of the exercise of some power granted to Congress, attempts to regulate matters inherent in or reserved to the states would undoubtedly be condemned to that extent. An act of Congress in pursuance of a power vested in Congress undoubtedly ought not to be unnecessarily extended to matters within the competency of the states. This, we take it, was the criticism of Mr. Justice SHIRAS in his dissenting opinion, so far as it applied to the supremacy of the act-of-Congress doctrine of the majority opinion in Brown v. Walker. The fallacy of the doctrine becomes apparent when the state, to whose statutes no such supremacy can be imputed, attempts to legislate upon a matter which must be conceded to be within its jurisdiction, and the claim is made of invalidity because it does not affect matters beyond its competency and jurisdiction to affect.

The more rational solution of the problem is that each legislative act, national as well as state, applies to and affects only matters made penal by the law of the government adopting it; that the constitutional provisions of each government were intended to be a protection with reference to matter made penal by the laws of that government; that the incidental disclosure in a federal investigation of a state offense does not bar the prosecution of the witness by the state authorities; and no more does the incidental disclosure in a state investigation of an offense against the

laws of the United States bar that government from prosecuting the witness therefor; that due process of law in the state courts, no more than due process of law in the federal courts, does not include the right to silence concerning violations of the laws of the other jurisdiction and does not require immunity from penalty by both jurisdictions to override such right of silence. Such extreme tenderness for the liberty of criminals can hardly have been intended by the constitution makers of either government.

Jacobson v. Massachusetts, 197 U. S. 26.

This is one of the most important questions which has been presented to this court in recent years. Every state is interested in its proper solution. Every state has penalized acts which in some other plane is penalized by Congress. Many states have immunity statutes in aid of their criminal procedure. Under all of them, no matter what the subject of the investigation provided for may be, witnesses may claim their answers will subject them to prosecution by the federal authority, and that the basis of that objection may be any one of the many federal offenses, and not necessarily one of the same kind that the state is investigating. (See plaintiff in error's brief, p. 38.) To work such a limitation upon the states, in the face of the accepted interpretation of the powers and relations between the states and the federal government, some clear limiting principle founded on express language in the federal constitution must be pointed to. None such can be found, unless it be the general phrase of the fourteenth amendment, "due process of law"; and to give that phrase such meaning and ex-

tension, light must be obtained not from the constitution, but from other sources which are supposed to lie back of that instrument and its language, and a meaning must be given to it which it did not have in the fifth amendment, and one which limits the effect of the tenth amendment and prevents the efficient exercise of the necessary powers of the state.

It is respectfully submitted that the judgment of the supreme court of the state of Kansas in this case should be affirmed.

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Syllabus and Opinion of the Supreme Court of the State in this Case.

THE STATE OF KANSAS
v.
JOHN D. JACK.
} No. 13774.

Appeal from Shawnee County. Affirmed.

SYLLABUS.

By the Court, ATKINSON, J.

1. A proceeding before the district court or district judge upon the written application of the county attorney or attorney-general, under section 10 of chapter 265, Laws of 1897 (Gen. Stat. 1901, sec. 7873), to take the testimony of witnesses as to their knowlege of violations of what is known as the "anti-trust law," is of the nature of an investigation or preliminary proceeding, is a valid exercise of judicial power, and the procedure due process of law.

2. That portion of section 10 of the bill of rights, that "no person shall be a witness against himself" cannot be claimed by a witness when by the terms of an immunity statute the immunity afforded is coextensive with the constitutional privilege of silence.

3. The immunity afforded by section 10 of chapter 265, Laws of 1897, to a witness subpœnaed to testify in a proceeding or inquiry, of his knowledge of violations of the anti-trust law, is coextensive with the constitutional privilege that no person shall be a witness against himself.

4. A witness subpœnaed to testify in a proceeding or inquiry of his knowledge of violations of the state anti-trust law (chapter 265, Laws of 1897) cannot refuse to testify on the claim that the immunity afforded by section 10 of the act does not afford protection against the possibility of his evidence being used against him in a prosecution for violations of the federal anti-trust law.

5. The provision of section 5 of chapter 265, Laws of 1897, that every person, company or corporation violating any of the provisions of the act within the state is denied the right and is prohibited from doing any business within the state, contemplates prohibiting only the continuing of business or the engaging in business in the state in violation of the act.

6. The provision of section 7 of chapter 265, Laws of 1897, that in any civil action there may be pleaded in defense that the plaintiff or any person interested in the prosecution has within one year been guilty of a violation of any of the provisions of the act, contemplates only civil actions relating to and growing out of transactions prohibited by the act.
7. Chapter 265, Laws of 1897 (Gen. Stat. 1901, §§ 7864–7874) is not in contravention of the provisions of the fourteenth amendment of the constitution of the United States, and is a valid exercise of legislative power.

The opinion of the court was delivered by ATKINSON, J.:

This is an appeal by John D. Jack from a judgment of imprisonment for contempt, in the district court of Shawnee county. Appellant, as a witness, refused to answer certain questions in a proceeding or investigation in that court concerning the existence of combinations of coal operators, in violation of the anti-trust law, and was adjudged guilty of contempt.

On September 3, 1903, the attorney-general and the county attorney of Shawnee county, proceeding under section 10 of chapter 265, Laws of 1897 (Gen. Stat. 1901, § 7873), filed in the district court of Shawnee county their verified application, informing the court of the existence of combinations of persons engaged in the operation of coal-mines in Osage county to fix the price of coal at the mines and the price to be charged to purchasers. It was therein averred that the members of said combinations had a meeting place in said county of Shawnee where they met monthly and fixed a minimum price to be charged for coal; that the members of said combinations would not sell coal for less than the minimum price fixed at said meetings, and that the agreements entered into by said combinations were carried out and executed by the members thereof. Among others named in said application as having a knowledge concerning the existence of these combinations, and from whom it was therein asked that a subpœna issue, was appellant. The district judge, upon said application, awarded subpœnas. The court overruled the motion of appellant to quash the subpœna issued. Ap-

pellant, pursuant to said subpœna, appeared in court as a witness, and was asked the following questions:

"Q. Do you know of any meetings of the operators of Osage county being held in this city (Topeka) at intervals during the past year?"

"Q. I will ask if you have any knowledge of a combine or an agreement being entered into by operators in coal of Osage county for the purpose of fixing the price of coal sold to residents and citizens of Kansas?"

"Q. Have you any knowledge of any meetings of coal operators of Osage county, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?"

"Q. Do you know of any agreement having been entered into within this county within the last year between the operators in coal who operate in Osage county, Kansas, by which they attempted to fix and settle the price of coal between themselves and citizens of Kansas?"

Appellant refused to answer each of the foregoing questions, and assigned the following as his reasons for such refusal:

"I am engaged in operating a coal-mine in Osage county, Kansas, and in dealing in the output of said mines, and am one of the persons named in the application for subpœnas in this proceeding. The product of the mines of Osage county is the subject of both domestic and interstate commerce. I respectfully decline to answer the questions, or to testify with reference to the subject of this inquiry, for the reason that in answering the questions and in submitting myself to an examination as a witness I may incriminate myself and give information as to the details of the said alleged combination and agreement, and the names of parties and witnesses which might supply the means of convicting me of a crime and of subjecting me to imprisonment, fines, forfeitures, and penalties, and I therefore claim the privilege and immunity of section 10 of the bill of rights."

The "anti-trust law," chapter 265, Laws of 1897 (Gen. Stat. 1901, §§ 7864–7874) is vigorously assailed. It is charged that the act is in violation of the fourteenth amendment to the federal constitution in this, that it is a depriving of liberty without due process of law; a taking of property without due process of law; and a denial of the

equal protection of the law, contrary to the guaranties of said constitutional amendment. It is also charged that to require appellant to answer the foregoing questions, for the refusal to answer which he was adjudged guilty of contempt, is to deprive him of the rights, privileges and immunities guaranteed by section 10 of the bill of rights.

The motion to quash the subpœna raised the question whether the proceedings upon application and the issuing of subpœnas thereunder, as provided by section 10 of the anti-trust law, is due process of law, within the meaning of the fourteenth amendment to the federal constitution.

Section 10, being section 7873, General Statutes 1901, reads:

"The several district courts of this state and the judges thereof shall have jurisdiction, and it shall be their duty, upon good cause shown and upon written application of the county attorney or the attorney-general, to cause to be issued by the clerk of said court subpœnas for such witnesses as may be named in the application of a county attorney or the attorney-general, and to cause the same to be served by the sheriff of the county where such subpœna is issued; and such witnesses shall be compelled to appear before such court or judge at the time and place set forth in the subpœna, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person subpœnaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpœnaed shall be taken down by the reporter of said court, and shall be transcribed and placed in the hands of the county attorney or the attorney-general, and he shall, in the proper courts, at once prosecute such violator or violators of this act as the testimony so taken shall disclose. Witnesses subpœnaed as provided for in this section shall be compelled to attend from any county in the state."

It is urged by appellant that the proceeding upon application provided by said section 10 is not judicial in its character, and is not due process of law, in that it is not founded on either complaint, information, or indictment.

District courts are expressly provided for by the constitution and are therein given such jurisdiction as may be provided by law. (Const., § 6, art. 3.) The extent of their jurisdiction and the character of their procedure are left to the legislature. District judges are expressly provided for by the constitution. They are therein given such jurisdiction at chambers as may be provided by law. (Const., § 16, art. 3.) The extent of their jurisdiction being left to the legislature.

The wide scope given to the states in the matter of their judicial tribunals and the character of their procedure, as recognized by the federal government, is clearly set forth in the opinion of the court by Mr. Justice BREWER in case of Brown v. New Jersey, 175 U. S. 172, where it was said:

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution. (*Ex parte* Reggel, 114 U. S. 642; Iowa Central Railway v. Iowa, 160 id. 389; Chicago, Burlington & Quincy Railroad v. Chicago, 166 id. 226.) 'The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.' (Missouri v. Lewis, 101 U. S. 22, 31.) . . .

"A perfectly satisfactory definition of due process may perhaps not be easily stated. In Hurtado v. California, 110 U. S. 516, 537, Mr. Justice MATTHEWS, after reviewing previous declarations, said: 'It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.' In Leeper v. Texas, 139 U. S. 462, 468, Chief Justice FULLER declared 'that law, in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied.'"

Section 1923, General Statutes 1901, gives to district courts general original jurisdiction of all matters, both

civil and criminal, not otherwise provided by law. Section 1924 provides that district judges shall have and exercise such power in vacation or at chambers as may be provided by law, . . . and to punish for contempt in open court or at chambers. . . . The right of the district courts and district judges to punish for contempt, and without a jury, is well recognized. *In re* Millington, 24 Kan. 214; The State v. Durein, 46 id. 695; A. & E. Encycl. of L., 7 (2d ed. 66). In matters of contempt a jury is not required by due process of law. (Interstate Commerce Com. v. Brimson, 154 U. S. 447.) The legislature has by section 10 of the anti-trust act conferred upon district courts and district judges jurisdiction, upon written application, to cause to be issued by the clerk of the court subpœnas for witnesses, to compel their attendance in obedience thereto, and to punish for contempt for a refusal to testify. In the case of Interstate Commerce Com. v. Brimson, *supra*, the court upheld a somewhat analogous provision of the interstate-commerce act, wherein the circuit court is given power to entertain an application of the commission, issue subpœnas, examine and commit for contempt in cases where the witness refuses to testify. The procedure under said section 10 is an investigation or preliminary proceeding, and can result in no final judgment, aside from a proceeding in contempt against a recalcitrant witness, except as the consequence of a regular judicial trial, conducted in the manner provided by statute. It is a valid exercise of judicial power and the procedure due process of law.

The case of The State v. Smiley, 65 Kan. 240, was an appeal from a judgment of conviction for a violation of the anti-trust law. It was there charged that the act imposed such limitations upon freedom of contract as to constitute a deprivation of the right of property, contrary to the fourteenth amendment of the federal constitution. This court in that case held that the act did not conflict with the guaranty of right to acquire property by lawful contract, secured by the federal constitution, and that the act was a valid exercise of legislative power.

It is contended by appellant that to have answered upon

the investigation before the district court the foregoing questions, for the refusal to answer which he was adjudged guilty of contempt, would have deprived him of the privileges and immunities guaranteed to him by section 10 of the bill of rights. The provision of the bill of rights by him relied upon reads, "No person shall be a witness against himself." This right is not only a constitutional right, but it is one of the fundamental principles of the common law, embodied in a maxim, that no man can be compelled to criminate himself. The proceeding before the district court was of the nature of an investigation to inquire whether there had been criminal violations of the anti-trust law. If appellant was guilty of any of the offenses of which inquiry was made by the questions he refused to answer, he himself was liable to criminal prosecution under this law. He assigned as a reason for his refusal to answer the questions, that in doing so he might incriminate himself under the anti-trust law, he being an operator of coal-mines in the state and dealing in the output of these mines. The legislature, by section 10 of the anti-trust law, provided immunity to witnesses subpœnaed to give information concerning violations of the act in the following language:

"Any person subpœnaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding"

Was appellant as a witness upon the investigation entitled to invoke the protection of section 10 of the bill of rights? Was he entitled to plead the privilege of silence? If the immunity against prosecution provided by section 10 of the anti-trust law affords the witness upon such investigation the protection against future prosecutions that is guaranteed to him by section 10 of the bill of rights, then appellant was not entitled to invoke the protection of section 10 of the bill of rights; was not entitled to plead the privilege of silence. (Counselman v. Hitchcock, 142 U. S. 547; Brown v. Walker, 161 id. 591.)

There is no claim that it is beyond the power of the legislature of the state to grant amnesty to witnesses against

future prosecutions for violations of the laws of the state. It is well settled that legislative bodies possess the power to grant amnesty to witnesses and compel them to give testimony against themselves. This power has been recognized as a public necessity in the enforcement of laws. Congress and the legislatures of many of the states have enacted immunity statutes for the purpose of securing conviction for offenses such as gambling, bribery, the manufacture or sale of intoxicating liquors, usury, combinations in restraint of trade, and other like offenses in which two or more persons participate to constitute the crime; the necessities of the case and the difficulty of obtaining witnesses to establish the offense, punish the offenders and suppress the crime being deemed sufficient to warrant the extending of immunity to a participant to constitute him a competent witness to be used against the remaining offenders. The constitutional privilege that a person shall not be required to be a witness against himself is one of great value to the citizen. However, the authorities, state and federal, recognize the rule that when the testimony sought cannot, by reason of an immunity statute, be used as a basis for or in aid of a prosecution which might result in fine or imprisonment or involve a penalty or forfeiture, the reason for the rule ceases and the privilege cannot be claimed. Immunity statutes must be given a reasonable construction, and not a strained and artificial one, and when it is apparent to the court that a person is fully protected from the effect of his testimony he should be required to give evidence, even though it may show him to have been guilty of a criminal offense.

It is claimed, however, that the immunity afforded by section 10 of the anti-trust law is not sufficient to constitute a substitute for the privilege of silence guaranteed the witness by section 10 of the bill of rights. The legislature determines what acts of the individual shall constitute a crime against the state, and what shall constitute the punishment of an offender upon conviction. It determines within what period a prosecution for the commission of an offense must be commenced, and may determine, within constitutional limitation, what shall and what shall not constitute

competent evidence to be used upon a trial for the punishment of an offender. The protection afforded the witness by the constitution is that of not being a witness against himself. If the act of which inquiry is made does not constitute a crime, or, if made a crime, has no punishment prescribed for its violation, or is no longer punishable, or if the act is barred by the statute of limitations, with no action pending, or has been repealed, or if the witness has been tried for the offense and acquitted, or convicted and satisfied the sentence imposed by the law, he could claim no exemption from answering questions relating thereto. Likewise is the witness deprived of claiming this exemption from giving evidence if the legislature by the enactment of an immunity statute has provided that he shall not be liable to criminal prosecution for any violation of the act about which he may testify nor his evidence be used against him in any criminal proceeding. As to those crimes to which his evidence relates or might be used, under the immunity act the witness is in the same position, in so far as there is a possibility of using his evidence against him, as though there were no such crimes provided by statute. Section 4 of the act provides that, for a violation of any of the provisions of the act by a corporation or any of its officers or agents, the corporation shall upon proper proceedings therefor forfeit its charter, rights, and franchises.

It is urged that the amnesty provided by section 10 is not complete, as it affords no immunity to a stockholder in any such corporation. There is nothing in the record disclosing appellant to be a stockholder, an officer or agent, or otherwise connected with any corporation that may in any manner be affected or suffer as the result of his disclosure as a witness. The constitutional provision was intended for the protection of the witness. The hurt must be his own. He must himself be included in the terms of the law before he has just grounds for complaint. (The State v. Smiley, 65 Kan. 240.) However, it was never intended that the immunity afforded the witness by the act should extend to and protect the stockholders, officers and agents of a corporation, as such. The immunity extends to the wit-

ness alone. It was not contemplated that it should be made use of as a pretext for securing immunity to others. That the immunity afforded the witness, to be complete, must extend to the officers, agents and stockholders of a corporation, as contended for by appellant, is too remote. Immunity statutes must be given a reasonable construction and not a strained or artificial one.

Section 5 provides, as a punishment for one convicted of a violation of the act, a fine of not less than $100 nor more than $1000, and confinement for not less than thirty days nor more than six months. Sections 5 and 6 provide a penalty of $100 per day for each and every day such violation continues after conviction. There is a further provision of section 5 that every person, company or corporation violating any of the provisions of the act within the state are denied the right and are prohibited from doing any business within the state. This latter provision contemplates prohibiting only the continuing of business or the engaging in business in the state in violation of the act. It was not intended thereby to prohibit persons continuing or engaging in any lawful business in the state not conducted or carried on in violation of the act. Viewed in the light of the interpretation thus given it, the provision is a valid exercise of legislative power and is not open to the charge made against it by appellant, that it constitutes in effect banishment from the state.

The provision of section 7, that in any civil action there may be pleaded in defense that the plaintiff or any person interested in the prosecution has within one year been guilty of a violation of any of the provisions of the act, as held in Barton v. Mulvane, 59 Kan. 313, under a very similar provision of the anti-trust act of 1889, contemplates only civil actions relating to and growing out of transactions prohibited by the act. It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property, rights and interests not connected with such combinations or trusts. Thus interpreted the provision is a valid exercise of legislative power, and is not open to the charge of appellant that it constitutes outlawry.

It was the intention of the legislature by section 10 of the act to afford the witness complete immunity against criminal prosecution, fines, imprisonment, penalties and forfeitures for any violation of the act about which the witness might give evidence upon a proceeding or investigation by the state to acquire information as to violations of the act, and also to afford complete immunity against the testimony given by the witness being used against him in any proceeding of a criminal nature. The immunity afforded by the act is coextensive with the constitutional privilege that no person shall be a witness against himself. A statute providing such immunity is sufficient. A witness thus protected cannot invoke the constitutional provision of silence. (Counselman v. Hitchcock, *supra;* Brown v. Walker, *supra;* People v. Butler Street Foundry, 201 Ill. 236; Bradley v. Clark. 133 Cal. 196.)

Appellant assigned as a further reason why he should not answer the questions propounded to him, for the refusal to answer which he was adjudged guilty of contempt, that the immunity afforded by section 10 of the anti-trust act did not protect him against criminal prosecution, fines and forfeitures for violations of the federal anti-trust law. The proceeding before the court was an investigation to inquire whether there had been a violation of the state anti-trust law. Appellant, as a witness in the district court upon the inquiry, stated that the product of the mines of Osage county was the subject of both domestic and interstate commerce.

If the product of the mines of Osage county was, as stated, the subject of interstate commerce, and appellant, as an operator of these mines, in their operation violated the provisions of the federal anti-trust law, and thereby became liable to criminal prosecution, fines and forfeitures thereunder, could he, in an investigation in the state courts to inquire if there had been violations of the state anti-trust law, refuse to testify, if the immunity provided by section 10 did not protect him against the possibility of criminal prosecution, fines and forfeitures for violations of the federal anti-trust law? It is not to be presumed that the examination upon inquiry will go beyond violations of

the state anti-trust law? If such examination be confined to its legitimate scope, it will not include, but will exclude, all acts which would connect it with interstate commerce in violations of the federal anti-trust law. Under its power to regulate interstate commerce, the United States may legislate upon the subject of private contracts relating to such commerce, and prohibit combinations, pools and trusts so far as they relate to interstate commerce, but has no jurisdiction over combinations, pools, and trusts, relating to commerce wholly within the state. Nor does the United States acquire jurisdiction over that part of a combination or agreement relating wholly to commerce within a state by reason of the fact that the combination also covers and regulates commerce which is interstate. In so far as such combinations interfere with interstate commerce, they are under the control of the United States. In so far as they interfere with commerce wholly within the state, such combinations are subject only to the jurisdiction of the state. (Addyston Pipe & Steel Co. v. United States, 175 U. S. 211.)

Where two governments like the United States and a state exercise their authority within the same territory, and over the same citizens, the legislation of that which as to certain subjects is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded. (Commonwealth v. Gagne, 153 Mass. 205.)

In the case of Brown v. Walker, *supra*, Brown, who was auditor of the Alleghany Railway Company, was subpœnaed as a witness to give testimony before the federal grand jury upon an investigation concerning alleged violations of the interstate-commerce act by the railway company. He refused to testify, claiming that to answer the questions would tend to accuse and incriminate him. He was adjudged to be in contempt. *Habeas corpus* proceedings were instituted in the United States circuit court and he was by that court remanded to the custody of the marshal. An appeal was had to the United States supreme court. It was by appellant claimed that the immunity

provided by the interstate-commerce act was insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself. The immunity provided by the act was by the court held sufficient. Mr. Justice BROWN, in delivering the opinion of the court, with reference to the construction of the immunity clause of the act said:

"It can only be said in general that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not to hold the law invalid unless, as was observed by Mr. Chief Justice MARSHALL, in Fletcher v. Peck, 10 U. S., 6 Cranch, 87, 128 (3:162, 173), 'the opposition between the constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.'"

It is further claimed, in Brown v. Walker, *supra*, that the amnesty provided for by the interstate-commerce act, if sufficient to grant immunity from prosecution by the federal courts, did not afford immunity against prosecution in the state courts. In treating the proposition and the improbability of being subject to the criminal laws of another sovereignty, after having quoted extensively with approval from the opinion of Lord Chief Justice COCKBURN upon that subject, Mr. Justice BROWN said:

"But even granting that there was still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice COCKBURN said in Regina v. Boyes, 1 Best & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the house of commons, is not a real and probable danger, with reference to the ordinary operations of the law in ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible

contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate. The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to indemnity against the state, or even against the prosecutor, if the action of the latter was taken in good faith and in a reasonable belief that he was justified in so doing."

The anti-trust act of Illinois requires corporations doing business in the state to make and file annually with the secretary of state what is termed an "anti-trust affidavit." In People v. Butler Street Foundry, *supra*, an action to recover penalty of fifty dollars per day for failure to make and file such affidavit, as a defense to such action, it was charged that to require the making of the affidavit was a violation of the constitutional provision of the state, that "no person shall be compelled in any criminal case to give evidence against himself." The act provided immunity against criminal prosecution for truthful disclosures of matters required by the affidavit. The affidavit required a disclosure of any connection of the corporation with any combinations, pools, trusts, etc., in restraint of trade or commerce. It was urged that the immunity was not coextensive with the constitutional privilege, and that it did not cover prosecutions under laws of other states or of the laws of the United States. In passing upon the validity of the anti-trust act, it was held that while the act might be broad enough to include trusts, pools and combines formed with parties outside of the state, yet in construing the act the court must consider it as relating to trusts, pools and combines formed within the state. As to the sufficiency of the immunity challenged, it was held that it was complete

against prosecution by the federal authorities or the authorities of other states, since the affidavit required, to the making of which immunity was extended, need relate only to trusts, pools and combines within the state. In making reference to the sufficiency of the immunity afforded by the act, as applied to violations of the federal anti-trust law, the court said:

"The possibility that the affidavit required by section 7a of the anti-trust act of 1891 might contain disclosures tending to show a violation of the anti-trust law of some other state or of the United States, is not a real and probable danger of criminal prosecution within the constitutional privilege against giving self-incriminating evidence."

The anti-trust law (chapter 265, Laws of 1897) is a valid exercise of legislative power, and is not, as claimed by appellant, violative of the fourteenth amendment of the federal constitution. Section 10 of the act contemplates that, in the proceeding or investigation before the district court or district judge to inquire if there had been violations of the state anti-trust law, the inquiry will be confined to violations of that law. The record discloses the examination of appellant upon the inquiry to have been confined to its legitimate scope. Within the scope of inquiry, the immunity afforded appellant by section 10 was coextensive with the constitutional privilege invoked for his protection. The possibility that his answers to the inquiries might disclose violations of the federal anti-trust law, and the evidence thus given be used against him in a criminal prosecution for a violation of that law, was not a real and probable danger of criminal prosecution within the constitutional privilege that no person shall be a witness against himself.

Appellant should have answered the questions asked him upon the inquiry. The judgment of the court below is affirmed.

All the justices concurring.